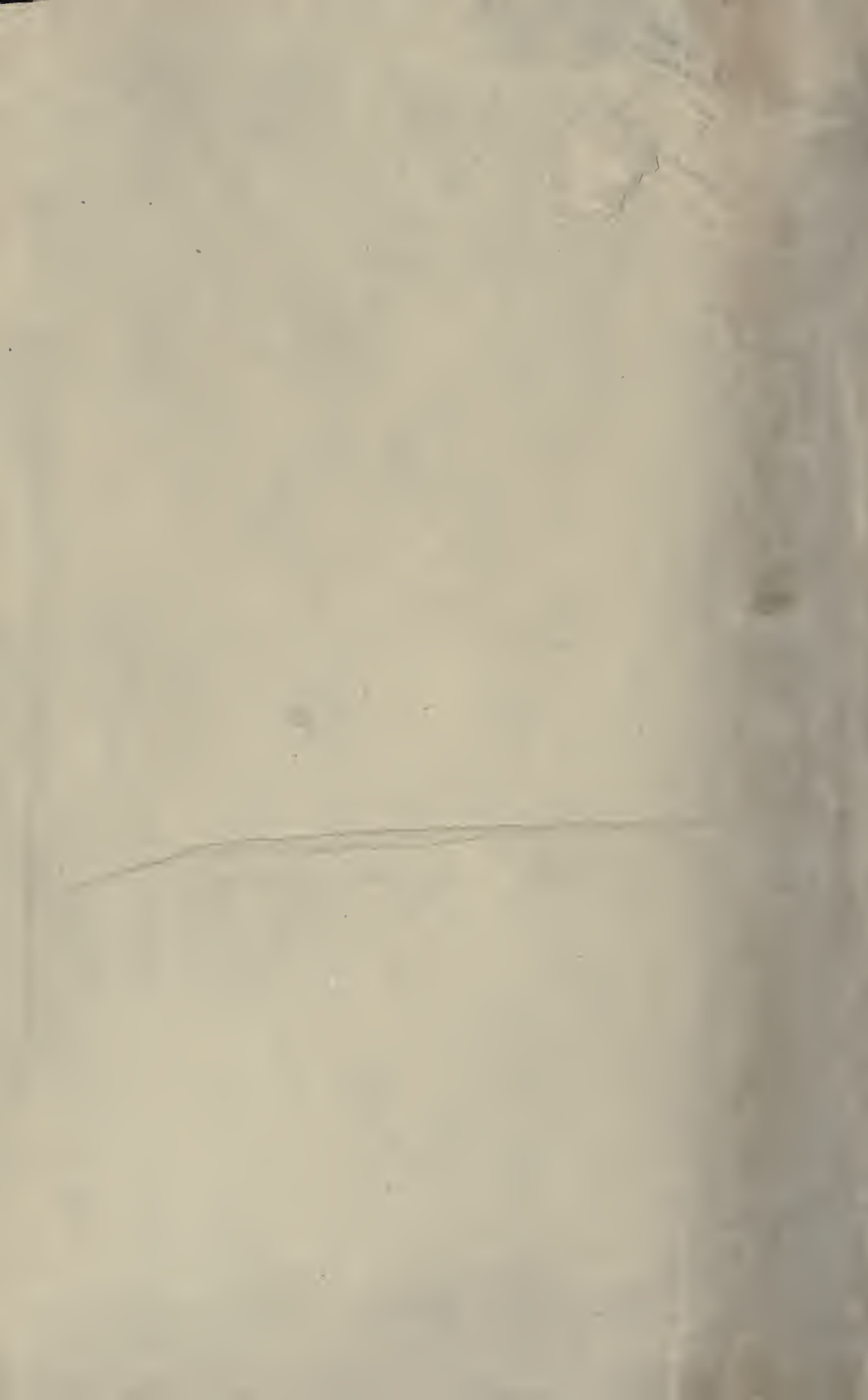




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THE
PUNJAB RECORD

OR

Reference Book for Civil Officers,

CONTAINING

REPORTS OF CIVIL AND CRIMINAL CASES DETERMINED BY
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2. *Abandonment—Abandonment of land—Extinguishment of proprietary rights—Limitation—Reversioners, suit by—Adverse possession—Successive female heirs—Possession adverse to the female adverse to the reversioners—Limitation Act, 1877, Schedule II, Articles 141, 142.*—On the death of the original owner, about twenty years ago, his widow succeeded him, she being unable to pay a sum of Rs. 98-10-0 due to Government on account of land revenue, left the village and went away to her parents. The plaintiffs being the reversioners were asked to take up the land, and pay the revenue due which had been realized from the defendant as *lambardar*, who was also a distant relation, declined saying that after the death of the widow they would set up their claim in the form they might consider proper. The defendant then asked to be put in possession of the land as he had already paid the amount due from the defaulter, and agreed to give it up after cutting the standing crop whenever the widow paid him Rs. 98-10-0. Thereupon the widow was entered as absent, and the defendant in possession of her land. Shortly after the widow died without having made any effort to regain her land. In 1885 the land was mutated in

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No.

ABANDONMENT OF LAND—*contd.*

the name of the widow's husband's mother, who was also an absentee, defendant being recorded in possession as before. The mother-in-law died ten years before the present suit, and the plaintiffs now claimed possession from the defendant on the payment of the sum of Rs. 98-10-0 paid by him on account of the land. The defendant pleaded limitation and also abandonment of their rights by the plaintiffs on the widow's leaving the village, and the land being offered to them by the Revenue authorities. *Held*, that no abandonment had been proved either on the widow's or plaintiff's part. The fact of the widow's going to her parents at a time of distress did not indicate any intention to give up her life-interest in her land, but even had any such intention on her part been proved, the plaintiffs would not have been bound, as they did not derive their title from or through her. The plaintiffs declining to take land in 1879 when called upon by the Revenue authorities cannot be held to amount to an abandonment, as their title to possession had not accrued at that time. *Held, further*, that the circumstances under which the defendant obtained possession of the widow's property in 1879, and the mutation in her mother-in-law's name in 1885, after her death, indicated the nature of the defendant's possession. In order to be adverse the possession must be like that of an owner, and with an intention on the part of the holder to hold the property for himself as such. The mere holding of the property without such intention does not confer a prescriptive title or extinguish that of the original proprietor out of possession. *Held, also*, that Article 141 of the second Schedule of the Limitation Act, 1877, was applicable, and that the plaintiffs' suit would not have been barred even if adverse possession of defendant in the lifetime of the widow had been proved, as plaintiffs' right to sue did not accrue until after the death of the mother-in-law of the widow, and that the discontinuance of possession which might have been fatal had the person absconding in 1879 been a male could not, for the same reason, bar the application of Article 141, and therefore Article 142 had no application.

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4. *Adverse possession—Joint owners, landlord and tenant—Non-payment of rent—Burden of proof—Limitation Act, 1877, Schedule II, Article 142.*—The plaintiffs as proprietors sued for the possession of half the area of three wells in which the defendant, who was owner of the other half share, was occupancy tenant. The land having been washed away by the action of the river re-appeared in 1880. Since then the defendant got himself recorded as proprietor of the whole of the land, and had paid no produce to the plaintiffs, although there had been some partial cultivation by his tenants. The defendant resisted the claim, and raised a plea of adverse possession for more than twelve years.

Held, that although the defendant got his name recorded as proprietor of land, of which he was only occupancy tenant, there was nothing to show that plaintiffs were aware of the entry, and the fact of the defendants being owner of the other half of the land would afford no notice of an adverse claim, there being no alteration in the apparent character of the defendant's possession from which plaintiffs

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No.

ADVERSE POSSESSION—*conclud.*

could become aware that defendant had set up a proprietary title, and also it was uncertain when his possession commenced to be adverse, that being so the burden of proof was on the defendant to prove a proprietary title by adverse possession, which he had failed to discharge.

Ram Chander Singh v. Madho Kumari (I. L. R., XII Calc., 484), *Toti v. Sokotin* (18 P. R., 1888), and *Tulsi Ram v. Jhandu* (186 P. R., 1888), followed. *Mohima Chunder Mozoomdar v. Mohesh Chunder Neoghi* (I. L. R., XVI Calc., 473), *Jafar Hussain v. Mashuq Ali* (I. L. R., XIV All., 193), *Faki Abdulla v. Babaji Gungaji* (I. L. R., XIV Bom., 458), and *Alima v. Kutti* (I. L. R., XIV Mad., 96), referred to *HONDA v. BHAKU AND OTHERS*

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AGENT.

Liability of Agent to render accounts to his principal.

See *Contract Act*, 1872, *Section 30*.

AGREEMENT.

Absence of express agreement to pay interest—Implied agreement.

See *Interest*, Nos. 1, 3.

ALA LAMBARDAR.

Grant of a portion of the village common land to a person holding the office of ala-lambardar rent free—Suit for dispossession by the proprietors of the land—Landlord and tenant—Punjab Tenancy Act, 1887, Section 4, clause 5—Jurisdiction.

See *Jurisdiction of Civil or Revenue Court*.

ALLUVION AND DILUVION.

Regulation XI of 1825, Section 4.—Alluvion—Title to land acquired by accretion—Identification of site.—Whereupon the facts it was found that a certain area, which was some 30 years ago submerged in the river, and which had recently emerged owing to the recession of the river, and which had mainly, if not entirely, re-appeared in one year, and was identifiable in situ as the tract of land which belonged to the plaintiffs.

Held, that the re-appearance not being a gradual accretion within the meaning of the 1st clause of Section 4 of Regulation XI of 1825, and the land being identifiable in situ, the plaintiffs who owned it prior to its submersion were entitled to its possession under the 5th clause of that section on the general principles of equity and justice.

Lopez v. Maddan Mohan Thakoor (5 B. L. R., 521), and *Chunder Bhan v. Ahmad Yar Khan* (36 P. R., 1898) followed. *Debi Bakhsh Singh v. Tirbhawan Singh* (I. L. R., XIX All., 238), explained. *HASHMAT AND OTHERS v. DULLA AND OTHERS*

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The references are to the Nos. given to the cases in the "Record."

No.

ANCESTRAL PROPERTY.

1. *Ancestral property—Piragheb, Tahsil and District Jhelum.—Held*, that when the lands of a village are held by various races and were given simply to any one who would undertake their burdens, a portion of such land cannot be considered ancestral, merely because an ancestor may have held it or other land in the village in past times. *FAKIR AND OTHERS v. DAULAT AND OTHERS* 81
2. *Self-acquired property of an uncle inherited by his nephews on his dying childless was not ancestral property qua the sons of those nephews, as it was not inherited from a direct male ancestor.* *JHANDA SINGH AND OTHERS v. GURMUKH SINGH* 93

APPEAL, CIVIL.

1. *Civil Procedure Code, 1882, Section 588 (24), 622 and 647—Appeal—Guardian and Wards Act, 1890, Sections 12 and 48—Order of District Judge fixing the fee of a custodian of the property of the Ward appointed under Section 12—Revision—Punjab Courts Act, 1884, Section 70.—Held*, that no appeal lies from an order of a District Judge fixing the fee of a custodian of the property of a Ward appointed under Section 12 of the Guardian and Wards Act, 1890, but that such an order can be revised under the authority of Section 48 of that Act, Section 70 of the Punjab Courts Act of 1899, although it repealed, re-enacted in a modified form Section 622 of the Civil Procedure Code. *MINA MAL v. RAI BAHADUR HARDHIAN SINGH*... .. 48
2. *Appeal—Appeal from insolvency order—Civil Procedure Code, 1882, Sections 588 (17) and 589.—By Punjab Government Notification No. 940, dated 24th October 1888, the Divisional Court is deemed to be the District Court per proviso (a), Section 589, Civil Procedure Code, 1882, consequently in all suits where the subject-matter is not more than Rs. 5,000, an appeal from an order under Section 351 (a) of the Code lies to the Divisional Court.*
Venkatrayar v. Jamboo Ayyar (I. L. R., XVII Mad, 377), distinguished. *BHAGWAN DAS AND OTHERS v. JAI RAM DAS AND OTHERS* 58
3. *An order declining to review a previous order was not appealable,* *CHODARI GURMUKH SINGH v. MUSSAMMAT MIRZA NUR* 63
4. *Arbitration—Award—Agreement to refer to arbitration—Application to file such agreement—Appeal—Appeal on grounds other than the decree being in excess of, or not in accordance with, the award—Civil Procedure Code, 1882, Sections 520, 521, 522, 523 and 525.—Held*, by the Full Bench:
(i) That an appeal lies from an acceptance rejection of an application under Section 525, Civil Procedure Code, when the award is illegal *ab initio*, and
(ii) That an order rejecting an application under Section 523, Civil Procedure Code, is appealable. *JHANGI RAM v. MUSSAMMAT BULHO BAI* 84

The references are to the Nos. given to the cases in the "Record."

No.

ARBITRATION.

Award—Agreement to refer to arbitration—Application to file such agreement—Power of Court where there is a denial to the execution of such agreement—Competency of Court to enquire into objection denying validity of a reference to arbitration—Appeal—Appeal on grounds other than the decree being in excess of, or not in accordance with, the award—Civil Procedure Code, 1882, Sections 520, 521, 522, 523 and 525.—Held, by the Full Bench:

- (i) That a Court is competent, upon an application under Section 525, Civil Procedure Code, to file an award to enquire into and decide objections other than those specified in Sections 520 and 521 of the Code;
- (ii) That Section 526 does not limit the enquiry allowed under Section 523, and that a Court is competent upon an application under that section to file the reference to arbitration in spite of defendant's denial of the agreement to refer;
- (iii) That an appeal lies from an acceptance or rejection of an application under Section 525, Civil Procedure Code, when the award is illegal *ab initio*; and
- (iv) That an order rejecting an application under Section 523, Civil Procedure Code, is appealable.

Narain Das and another v. Manohar Lall and others (21 P. R., 1898, F. B.), overruled. *Gulam Jilani Khan v. Muhammad Hassan* (74 P. R., 1894, F. B.), *Hussaini Bibi v. Mohsan Khan* (I. L. R., I All., 156), *Surjan Raot v. Bhikari Raot* (I. L. R., XXI Calc., 213), and *Tejpur Dewchand v. Mahomed Jamal* (I. L. R., XX Bom., 596), disapproved. *Mahomed Wahid-ud-din v. Hakimian* (I. L. R., XXV Calc., 757), *Atma Ram v. Jamita* (134 P. R., 1888), *Ram Rattan v. Vasakha Mal* (49 P. R., 1893), *Amrit Ram v. Dasrat Ram* (I. L. R., XVII All., 21), *Chintamallayya v. Thaddi Gangireddi* (I. L. R., XX Mad., 89), *Kalli Prosanno Ghose v. Rajain Kant Chatterji* (I. L. R., XXV Calc., 141), *Raja Harnarain Singh v. Chaudhrain Bhagwant Koer* (I. L. R., XIII All., 300), *Chuha Mal v. Hari Ram* (I. L. R., VIII All., 548), *Husananna v. Linganna* (I. L. R., XVIII Mad., 423), *Gowdu Magata v. Gowdu Bhagwan* (I. L. R., XXII Mad., 299), *Saturjit Pertap Bahadur Sahai v. Dulhin Gulab Koer* (I. L. R., XXIV Calc., 469), *Nandram Daluram v. Nemchand Jadarchand* (I. L. R., XVII Bom., 357), *Amir Hassan Khan v. Sheo Bakhsh Singh* (I. L. R., XI Calc., 6), and *Cheto Mal v. Mahoo Mal* (4 P. R., 1882) cited. JHANGI RAM AND ANOTHER v. MUSSANMAT BUDHO BAI 84

B.

BADNI CONTRACT.

See *Contract Act*, 1872, Section 30.

BEQUEST.

By a sonless Awan proprietor of the Shahpur District in favor of his daughter's son.

See *Custom—Alienation. No. 5.*

The references are to the Nos. given to the cases in the "Record."

No.

BOND.

Suit on instalment bond—Limitation.

See *Limitation Act*, 1877, *Schedule II*, *Article 74*.

BUILDING.

Erection of a building—Bridging over a drain—Distinction between.

See *Punjab Municipal Act*, 1891. *Section 92*.

BURDEN OF PROOF.

1. *Of adverse possession.*

See *Adverse possession*, No. 4.

2. Non-agricultural Koreshis (Muhammadans) in the matter of succession.

See *Custom—Inheritance*, No. 7.

3. Non-agricultural Khatriis (Hindus) in the matter of succession.

See *Hindu Law—Inheritance*.

4. *Of the existence of a custom of pre-emption in respect of property situate in a town where the custom is not universal.*

See *Pre-emption* No. 8.

5. *Of adoption.*—In cases when the right of adoption is admitted or is found to prevail, and the parties are not members of an agricultural tribe, or land-holding group, the burden of proof ought to lie on those who deny that a particular kind of adoption, *e. g.*, that of a daughter's or sister's son cannot be made. SOHNUN AND OTHERS *v.* RAM DIAL AND OTHERS

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6. *Inheritance—Special family custom—Held*, that a party relying upon a special family custom, such as that only one son of the last owner, *viz.*, the fittest or the eldest, succeeds to the whole estate, the others getting only maintenance, must prove that such custom was ancient, invariable and definite. ZARIF KHAN *v.* AMIR KHAN AND OTHERS,

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7. In suits for the recovery of possession of immovable property when resisted by a plea of adverse possession, the plaintiff is bound to prove possession and dispossession within twelve years, but where the property in dispute up to a short time before suit remained waste and unoccupied, the plaintiff is not required to prove acts of possession within twelve years of suit, he has only to prove a *prima facie* title not extinguished by limitation in such a case. Waste land allowed to remain so by the proprietor cannot be held to be a discontinuance of possession, and the *onus* is in such a case shifted on to defendant to prove when his possession became adverse. RAMZAN ALI *v.* BASHARAT ALI AND OTHERS

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8. Khatriis, although following agricultural pursuits, cannot be presumed to have adopted the general customs of agriculturists in matters of succession and alienations, and the record-of-rights cannot

The references are to the Nos. given to the cases in the "Record."

No.

BURDEN OF PROOF—concl'd.

operate to make a Khatri proprietor an agriculturist subject to customs which govern the latter. The presumption is that a Khatri is only bound by so much of the record of rights as deals with pre-emption and similar customs. The burden of proof therefore that a Khatri in matters such as alienation or succession is governed by custom rests always on the party alleging that he is so bound. **HARNAM SINGH v. DEVI CHAND** 107

9. Where a person comes into Court alleging purchase of the *shamilat*, the *onus* of establishing it is on him, which is not discharged by proof that lands of separate *khatas* have been sold to him, as the rights of a proprietor in the former are not a mere accessory to the latter. **RAM DAS v. AMIR SHAH** 113

10. The burden of proof of right of a reversioner to restrain alienation of occupancy holding is upon the person asserting the rights to restrain such alienation. **FAIZ BAKSHI v. DIITA** 115

11. Although a presumption at the outset is against the power of an adoption of a daughter's son, but where evidence, such as an entry in a *Wajib-ul-arz* or *Riwaj-i-am* or precedents are produced by the adopted son, the burden of proof is shifted to the party denying the validity of such an adoption. **HEM RAJ v. SAHIBA** 116

12. The burden of proof that a sister of a deceased sonless Jat proprietor was entitled to inherit the landed property of a deceased in preference to the collaterals, though in the first instance is on the sister, but that the rules of inheritance detailed in a *Riwaj-i-am* are sufficient to shift such burden on to the collaterals. **SHERAN v. MUSSANNAT SHARMAN** 117

13. The burden of proof that collaterals of a sonless Khatri resident of a town are entitled to inherit the deceased's property in preference to his daughters and their sons is upon the collateral asserting such rights. **WISHAN DAS v. THAKAR DAS**... .. 119

C.

CAUSE OF ACTION.

Joint promise to plaintiff and others—Right to plaintiff to sue alone—

Non-joinder—Procedure.

See *Parties*, No. 3.

CHUNDAVAND AND PAGVAND.

See *Custom—Inheritance*, No. 3.

The references are to the Nos. given to the cases in the "Record."

No.

CIVIL PROCEDURE CODE, 1882.

SECTION 2.

And Section 215 (a)—Appeal—Order directing an account—Interlocutory order—Small Cause Court Suit—Act IX of 1887, Schedule II, Articles 30 and 31—Suit for partition of offerings after taking and explaining accounts and for inspection of strong-room in which the offerings were stored—Punjab Courts Act (XVIII of 1884), Section 40 (1) (i)—Further appeal.—Plaintiffs claiming to be interested in the income of a shrine, sued that accounts be taken and explained to them from 1871, and that they be allowed to inspect the strong-room in which the offerings were stored, and for partition of such of the offerings as were partible, and for their share on partition. The first Court held that they were entitled to have accounts taken from 1888 only, and passed orders under Section 215 (a) of the Code of Civil Procedure, but the Divisional Judge, on appeal, held that the order of the first Court being an interlocutory order, no appeal lay. The plaintiffs preferred a further appeal, under a certificate granted by the Divisional Judge, to the Chief Court, and the defendants, amongst other objections, urged that the suit being a small cause of value, not amounting to Rs. 1,000, no further appeal lay under Section 40 (1) (i). *Held*, that as Section 2 of the Code of Civil Procedure includes an order directing accounts to be taken, in the definition of decree, an appeal lay to the Divisional Court, and that the suit, as framed, being excluded by Articles 30 and 31, Schedule II, Act X of 1887, from the jurisdiction of a Court of Small Causes, a further appeal lay under the certificate granted by the Divisional Judge, inasmuch as the nature of a suit for an account is not changed merely by reason of a share in the collection being claimed.

Mela Mal v. Harbhaj (115 P. R., 1884) followed, *Narayan v. Balaji* (I. L. R., XXI Bom., 248), and *Damodar Gopal Dikshit v. Chintoman Balkrishin* (I. L. R., XVII Bom., 42) distinguished. *Ranjit Singh v. Ilahi Bakhsh* (I. L. R., V All., 520), *Coverji Luddha v. Morarji Punja* (I. L. R., IX Bom., 183), *Behari Lal Pandit v. Kedar Nath Mullick* (I. L. R., XVIII Calc., 464) referred to. KAKA RAM AND OTHERS v. RAM SARN AND OTHERS 13

SECTION 6.

And Sections 25, 223 and 647—Execution of decree—Power of Court to execute decree in excess of the limits of its pecuniary jurisdiction as an original Court—Punjab Courts Act, 1884, Section 35.—Held, that a Court to which a decree has been sent for execution has not jurisdiction to execute such decree when it is in excess of the limits of its pecuniary jurisdiction as an original Court.

Gopal Das v. Mussammat Golab Devi (70 P. R., 1897), *Ram Lal v. Natha Singh* (45 P. R., 1882), *Ganga Ram v. Gursarn Das* (31 P. R., 1887), *Narasayya v. Venkata Krishnayya* (I. L. R., VII Mad., 397), and *Shānmuga Pillai v. Ramanathan Chetti* (I. L. R., XVII Mad., 309) referred to. *Shri Sidheshwar Pandit v. Shri Harihar Pandit* (I. L. R., XII Bom., 155), *Gokal Krist Chunder v. Ankhil Chunder* (I. L. R., XVI Calc., 457), and *Durga Charau Mojumdar v. Umatura* (I. L. R., XVI Calc., 465) followed. KHAN BAHADAR NAWABZADA SHAMSHERE ALI KHAN v. MUSSAMMAT AHMAD ALLAHDI BEGAM 9

The references are to the Nos. given to the case in the "Record."

No.

CIVIL PROCEDURE CODE, 1882—*contd.*

SECTION 13.

See Res judicata.

SECTION 16 A.

Suit for possession of land—Uncertainty as to the Court's jurisdiction—Power of Civil Court to adjudicate on the correctness of boundaries laid down by the Settlement authorities—Punjab Courts Act, 1884, Section 18.—In a suit by the proprietors of *manza* Bharthwali, in Muzaffargarh District, for a declaration that certain land awarded to the proprietors of Kachnr, in the Multan District, by the Settlement authorities in a boundary dispute belongs to them and should be included within their village, the decree given by the Munsif in the plaintiffs' favour was reversed on appeal by the Divisional Judge, on the grounds that as by the orders of the Settlement Officers the disputed area at the time of the institution of the suit formed part of the Revenue district of Multan, and as the Revenue Officers had complete power to settle the boundaries of districts, and as such orders could not be questioned by a Civil Court, the Munsif of Muzaffargarh acted without jurisdiction.

Held, that the Civil Court had jurisdiction to go into the question of the correctness of the boundaries laid down by the Settlement authorities.

Held, also, (1) that the Munsif, having raised the point of jurisdiction himself, and decided that he had jurisdiction, substantially complied with the provisions of Sub section (1), Section 16 A of the Code of Civil Procedure, and

(2) that at best the proper place of institution was uncertain, and the objection not having been taken in the first Court, the Divisional Judge should not have allowed it with reference to Sub-section (2) of Section 16 A.

Combe v. Edwards (L. R., 3 P. D., 103) referred to. ALLAH DITTA AND OTHERS v. ABDUL QADIR KHAN AND OTHERS 1

SECTION 25.

And Sections 6, 223 and 247—Execution of decree—Power of Court to execute decree in excess of the limits of its pecuniary jurisdiction as an original Court—Punjab Courts Act, 1884, Section 35.

See Civil Procedure Code, 1882, Section 6.

SECTION 30.

See Parties, No. 4.

SECTION 54 (c).

Parties—Adding parties as plaintiffs—Joint promise to plaintiff and others—Right of plaintiff to sue alone—Cause of action—Non-joinder—Procedure.

See Parties, No. 3.

The references are to the Nos. given to the cases in the "Record."

No.

CIVIL PROCEDURE CODE, 1882—*contd.*

SECTION 108.

Decree ex-parte—Jurisdiction of District Judge to re-open an ex-parte decree which was appealed against to the Chief Court by the plaintiff.—In a suit where the plaintiff on obtaining an *ex-parte* decree for the major portion of his claim had unsuccessfully appealed to the Divisional Judge and the Chief Court as regards the portion disallowed, the District Judge, on the application of the defendant, after the decision of the Chief Court, re-opened the case under Section 108 of the Code of Civil Procedure.

Held, that under Section 108 of the Code the only Court which had jurisdiction at the time the application was made was the Chief Court, and that the action of the District Judge in setting aside a decree which in point of law was no longer existent at the time was altogether *ultra vires* and void. SAYAD ZAHUR-UL-HASSAN v. GANDU MAL ... 4

SECTION 198.

Dismissal of suit for non-appearance of parties on the day fixed for delivery of judgment—

See Dismissal of suit.

SECTION 203.

Judgment of Small Cause Court—Contents of—Small Cause Court Act, 1887, Section 25.—*Held*, that a judgment of a Small Cause Court should convey some indication that the Judge applied his mind to weighing the evidence on the record, or of the conclusion arrived at by him, and that the mere words "issue not proved and claim be dismissed" are obviously inadequate under Section 203 of the Civil Procedure Code.

Malik Rahmat v. Shiva Prasad (I. L. R., XIII All., 533), *Bai Jasoda v. Bhamasha Mancherji* (I. L. R., XXIII Bom., 335), and *Sarup Chand v. The Bombay, Baroda and Central India Company* (41, P. R., 1896), followed. SAMAND KHAN v. PIR BAKHSH ... 57

SECTION 215 (a).

And Section 2—Appeal—Order directing on account—Interlocutory order—Small Cause Court Act, 1887, Schedule II, Articles 30 and 31—Suit for partition of offerings after taking and explaining accounts, and for inspection of strong-room in which the offerings were stored—Punjab Courts Act, 1884, Section 40 (1) (2).

See Civil Procedure Code, 1882, Section 2.

SECTION 223.

And Sections 6, 25 and 647—Execution of decrees—Power of Court to execute decree in excess of the limits of its pecuniary jurisdiction as an original Court—Punjab Courts Act, 1884, Section 35.

See Civil Procedure Code, 1882, Section 6.

The references are to the Nos. given to the cases in the "Record."

No.

CIVIL PROCEDURE CODE, 1882—*contd.*

SECTION 244.

Execution proceedings—Jurisdiction of Court to entertain application after full satisfaction of the decree being entered—Procedure—Review—Appeal—Appeal from an order of declining to review the previous order.—Section 244 of the Civil Procedure Code does not apply to a Court which has fully executed a decree, and has thereby become *functus officio*, it applies only to a Court executing a decree at the time when an application connected with execution is made; therefore, where a judgment-debtor, after the final settlement had been effected, and the execution proceedings terminated, full satisfaction of the decree being entered, and the execution record being consigned to the record-room, made an application to the Court for the refund of a certain amount alleged to have been recovered from him by the decree-holder in excess of the sum due under the decree, *held* that the only course open to the judgment-debtor was to apply for a review of the order declaring the decree satisfied, and striking off the execution proceedings; but that where no objection to jurisdiction had been taken in the Court below, and the *forum* for the application for review was the same as the form selected by the judgment-debtor for the application for refund, the latter application might be treated as an application for review.

Held, further, that an order declining to review a previous order was not applicable.

Fakhr-ud-din Muhammad Ahsan v. The Official Trustee of Bengal (I. L. R., X Cal., 538), Sadasiva Pillai v. Ramalinga Pillai (24, W. R., 193), and Aziz-ud-din Hossain v. Ramnagar Roy (I. L. R., XIV Cal., 605), followed. Haji Ahmad Husain v. Sundar Lal (89, P. R., 1893), distinguished. CHAUDRI GURMUKH SINGH v. MUSSAMMAT MIRZA NUR ...

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SECTION 351.

Appeal from an insolvency order.

See Appeal, Civil, No. 2.

SECTION 520.

And Sections 521, 522, 523 and 525—Arbitration—Award—Agreement to refer to arbitration—Application to file such agreement.

Competency of Court to enquire into objection denying validity of a reference to arbitration—Appeal on grounds other than the decree being in excess of, or not in accordance with, the award—

See Arbitration.

SECTION 539.

Where the plaintiffs had applied for permission under Section 539 of the Code of Civil Procedure to sue to have a committee appointed by a Civil Court for the management of a certain religious trust, and to obtain such other relief as they might be entitled to under the said

The references are to the Nos. given to the cases in the "Record."

CIVIL PROCEDURE CODE, 1882—*contd.*

No.

section, and the Collector had merely "accorded permission," *held*, that the suit must be limited to matters covered by the sanction, and that the plaintiffs were not competent to sue for the removal of the defendant from the office of *mohant*, the Court having no authority to enlarge the scope of the suit, and to grant any other reliefs other than those included in the terms of the sanction, *PREM SINGH v. LABH SINGH AND OTHERS* 89

SECTION 559.

Joinder of respondents on appeal—"Interested in the result of appeal"—*Meaning of*.—A., B., C. and D. filed a suit for the recovery of certain moneys from the defendant. The first Court dismissed their suit *in toto*. From that decision all the plaintiffs appealed, but the Divisional Judge only accepted A.'s appeal, and rejected that of B., C. and D. The defendant filed a further appeal against the decree of the Divisional Judge. On the day of hearing an application was filed on behalf of B., C. and D. that they might be joined as respondents under Section 559 of the Code of Civil Procedure. *Held*, that the petitioners were not "interested in the result of the appeal" within the meaning of Section 559 of the Code of Civil Procedure, as their claim had been disallowed by both the lower Courts, and they had not appealed, and could not be granted a decree on an appeal against a decree in favour of a co-plaintiff, nor could any change be made in the order of dismissal passed against them.

Ujendra Lal Makerjee v. Girindra Nath Makerjee (I. L. R., XXV Cal., 565), *Hudson v. Basdeo Bajpaye* (I. L. R., XXVI Cal., 109), and *Ram Ditta v. Mohkam* (46, P. R., 1892), referred to. *RAI BHOLA RAM v. RAI SEKH CHAND MAL* 23

SECTIONS 588 (17) AND 589.

Appeal from insolvency order—

See *Appeal*, Civil, No. 2.

SECTION 622.

1. *Order of District Judge fixing the fee of a custodian of the property of the ward appointed under Section 12 of the Guardian and Wards Act, 1890*—*Revision*—*Punjab Courts Act, 1884, Section 20.*

See *Appeal*, Civil, No. 1.

2. *Revision*—*Chief Court's powers of*—*Practice Punjab Courts Act, 1884, as amended by Act XXV of 1899, Section 70.*

See *Punjab Courts Act, 1884, Section 70, No. 2.*

3. *Aud Section 623*—*Revision*—*Second application for revision after decision of first application*—*Review of order passed on revision*.—*Held*, that the dismissal of an application for revision in default of appearance does not bar the entertainment of a second application for revision, but where an application for revision has been entertained, and an order passed after consideration of the case, a second application for revision should not be received, the proper remedy being for the applicant to ask for a review of judgment, which may be had in such a case. *UMAR DIN AND OTHERS v. ALA BAKSH AND ANOTHER*

The references are to the Nos. given to the cases in the "Record."

No.

CIVIL PROCEDURE CODE, 1882—*concl'd.*

SECTION 647.

And Sections 6, 25 and 223 - Execution of decree - Power of Court to execute decree in excess of the limits of its pecuniary jurisdiction as an original Court—Punjab Courts Act, 1884, Section 35.

See Civil Procedure Code, 1882, Section 6.

COMMON LAND.

1. *Grant of a portion of the village common land to a person holding the office of ala-lambardar rent free—Suit for disposssession by the proprietors of the land—Landlord and tenant—Punjab Tenancy Act, 1887, Section 4, clause 5—Jurisdiction.*

See Jurisdiction of Civil or Revenue Court.

2. *Common land—Gora-deh—Erection of kotha by non-proprietary resident with the permission of a proprietor in possession—Absence of special damage.—A non-proprietor was allowed by one of the proprietors of the village to build a kotha on a portion of the gora-deh which he (the proprietor) had previously used himself as a cattle pen. The plaintiff and the proprietor in the village sued for demolition; the defendant and the consenting proprietor admitted that on the vacation of the site by them it would revert to the whole proprietary body. - Held, that in the absence of proof of substantial damage to the plaintiff his suit must fail, as he had not proved that he had ever exercised any specific rights over the site, or that the consenting proprietor had disposed of more than would fall to his share on partition, or that the alienation was a permanent one.*

Hidayat Ali Khan v. Basit Ali Khan (54, P. R., 1892), followed; Paras Ram v. Sherjit (I. L. R., IX All., 661), Shadi v. Anup Singh (I. L. R., XII All., 436), Nujin Khan v. Imtiaz-ul-din (I. L. R., XVIII All., 115), Sohail Singh v. Abdulla (78, P. R., 1877), Har Sarup v. Hanwanta (7, P. R., 1885), Amin Chand v. Dasumidha Singh (54, P. R., 1886), Ghulam Muhammad Khan v. Buta (187, P. R., 1889), and Kanakayya v. Narasimulu (I. L. R., XIX Mad., 38), referred to. RAM v. PIR BAKSHI

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3. *Common land.—Joint vacant piece of land in mohalla—Right of suit of some of the inhabitants of the mohalla affecting such land—Plaint—Alternative reliefs—Injunction when to be granted—Discretion of Court—Damages.—The plaintiffs sued to recover possession of a piece of land situate in front of their houses and shops, alleging that it had been jointly enjoyed by them, and that the defendants Nos. 1 and 2 having obtained a fictitious deed of sale of a portion thereof from defendant No. 5 had taken possession, and commenced to build thereon, the relief sought being either a decree for possession of the land, or an injunction restraining the defendants Nos. 1 and 2 from building thereon. The lower Appellate Court gave the plaintiffs, "as members of the community," a decree*

The references are to the Nos. given to the cases in the "Record."

No.

COMMON LAND - *contd.*

for possession, and also issued a permanent injunction to the defendants prohibiting the erection of any building on or other interference with the land in suit.

Held, (i) that the claims were not inconsistent, the difference being between sole right and joint right, and that the plaintiffs were at liberty to claim in the alternative exclusive possession of an injunction to restrain the defendants from interfering with their rights as co-sharers in the land in suit;

(ii) that the land in suit not being a public thoroughfare, the suit lay;

(iii) that the plaintiffs were entitled to sue in their own right for a relief common to themselves and others, and that the failure to sue on behalf of those others, was not a bar to their suit;

(iv) that inasmuch as the exclusive occupation by the defendants would have materially injured the plaintiffs they were entitled to the injunction issued by the first Court. GUJAR MAL AND OTHERS v. RAM RECHPAL AND OTHERS 91

4. *Limitation Act, 1877, Section 28—Suit for recovery of possession of common waste land encroached upon by a trespasser—Limitation—Adverse possession—Burden of proof—Suit by some of the several co-sharers against the trespasser affecting common land—Effect of non-joinder of other co-sharers—Civil Procedure Code, 1882, Section 3—Decree, form of.*—In suits for the recovery of possession of immovable property when resisted by a plea of adverse possession, the plaintiff is bound to prove possession and dispossession within twelve years; but where the property in dispute up to a short time before suit remained waste and unoccupied, *held* that the plaintiffs were not required to prove acts of possession within twelve years of suit, they had only to prove a *prima facie* title not extinguished by limitation in such a case. Waste land allowed to remain so by the proprietor cannot be held to be a discontinuance of possession, and the onus is in such a case shifted on to defendant to prove when his possession became adverse.

Held, also, that one or several of many co-sharers can sue to prevent invasion of their common property by a mere trespasser, and that in such a case a decree for sole possession, or for possession on behalf of other co-sharers should not generally be given, the proper form of decree should be for the restoration of the property to its condition prior to the trespasser's invasion, and so preserve the invaded rights which the plaintiff and other co-sharers possessed in the property.

Tannudin v. Pandu (I. L. R., XVIII Bom., 699), Inayat Husen v. Ali Husen (I. L. R., XX All., 182), Muhammad Ali Khan v. Khaja Abdul Ghany (I. L. R., IX Cal., 744), Muhammad Yar v. Ghulam (49 P. R., 1884), Hira Lal v. Bhairon (I. L. R., V All., 602), and Hidayat Ali Khan v. Basit Ali Khan (64, P. R., 1892), cited. Mohima

The references are to the Nos. given to the cases in the "Record."

No.

COMMON LAND—*concl'd.*

Chunder Mozoomdar v. Mohesh Chunder Neogi (I. L. R., XVI Calc., 473), *The Secretary of State for India in Council v. Vira Rayan* (I. L. R., IX Mad., 175), and *Jafar Husain v. Mashug Ali* (I. L. R., XIV All., 193), referred to. RAMZAN ALI v. BASHARAT ALI AND OTHERS ...

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5. *Common land—Purchase of separate holding in a village—Suit by purchaser for a declaration that he is entitled to a share in the shamilat—Inclusion or exclusion of share of shamilat—Burden of proof—Held*, that as the rights of a proprietor in the *shamilat* of a village are not a mere accessory to the land separately held by him, and that a sale of the latter does not *ipso facto* convey any rights in the former to the purchaser.

A clause in the *Wajib-ul-arz* providing that shares in the *shamilat* are proportional to the *khevat* lands held by each proprietor cannot confer any rights in the common land on the purchaser not conveyed by his deed of sale.

Maluk Singh v. Muhammad (65, P. R., 1889), and *Baju Shah v. Hukma* (42, P. R., 1897), cited, and *Prem Chand v. Sardara* (10, P. R., 1894), referred to. RAM DAS AND OTHERS v. AMIR SHAH AND OTHERS

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CONDITIONAL SALE—FORECLOSURE.

See *Mortgage*, Nos. 5, 7, 9, 10, 11, 13.

CONSTRUCTION OF DOCUMENT.

1. *Mortgage—Interest—Post diem interest—Absence of a covenant to pay interest after a certain date when the mortgage if not redeemed was to become a usufructuary one—Damages—Construction of document.*

See *Interest*, No. 4.

2. *Grant of Government revenue for life to parties' family in specific shares—Death of one sharer—Suit by the surviving sharer against the son of the deceased for certain instalments wrongfully enjoyed by the latter—Construction for such grant—Pensions Act, 1871, Section 6.*

See *Jagir*.

3. *Wajib-ul-arz.*—A clause in the *Wajib-ul-arz* providing that shares in the *shamilat* are proportional to the *khevat* lands held by each proprietor, cannot confer any rights in the common land on the purchaser not conveyed by his deed of sale. RAM DAS v. AMIR SHAH

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CONTRACT.

1. *Condition vital to contract, or merely ancillary to it—Evidence as regards.*

See *Public Company*.

The references are to the Nos. given to the cases in the "Record."

No.

CONTRACT—*concl.*

2. *Contract—Sub-letting contract, what is—Assignment—Illegality of assignment of, or sub-letting contract as opposed to public policy.*—A contract by which the plaintiffs agreed to supply the Commissariat authorities with certain *bhusa* contained a recital to the effect that the contract was not to be sub-let, although it could be transferred with the approval of the official by whom it was sanctioned. Subsequently the plaintiffs entered into an agreement with the defendant, under which the defendant was actually to supply the *bhusa* to the Commissariat Department, paying the plaintiffs one anna for each rupee's worth supplied. The defendant made default, and the plaintiffs had to perform their contract, and thereby incurred an alleged loss of Rs. 221 for which they sued the defendant. The first Court found that the agreement between the parties was void as being opposed to public policy, and dismissed the suit.

Held, that the defendant was not entitled to avoid fulfilling the terms of his agreement with the plaintiffs on the ground that it was opposed to public policy, merely because the plaintiff had done something which under the terms of their contract with the Commissariat Department they possibly should not have done. Where two parties, competent to contract, have formally entered into an agreement, one of them cannot be permitted to get rid of his obligation unless the plea that the object of the agreement is opposed to public policy is thoroughly well substantiated.

Printing and Numerical Registration Company v. Sampson (44 L. J. Ch., 705), cited. *SOBHA SINGH v LORINDA MAL AND ANOTHER* ...

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CONTRACT ACT, 1872.

SECTION 16.

1. *Contract—Undue influence.*—In a suit upon a registered mortgage deed where the defendants (mortgagors) pleaded undue influence, and in support of their plea were only able to prove that to this extent pressure had been put upon them to execute the mortgage deed as security for the payment of a debt, namely, that a choice had been given to them of executing the deed, or being at once put into Court.—*Held*, that such pressure did not amount to "undue influence" within the meaning of Section 16 of the Indian Contract Act as amended by Act VI of 1899. In order to reap the benefit of that section it was necessary for the defence to establish that the executants of the deed were induced to sign it because the plaintiff was in a position to dominate their will, and had used that position to obtain an unfair advantage over them.

Sital Prasad v. Parbhu Lal (I. L. R., X All., 535), distinguished. *BANK OF BENGAL v. DIN DIAL*

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2. *And Section 74—Undue influence—Penalty—Unconscionable bargain—Interest—Act XXVIII of 1855, Section 2.*—In the absence of evidence that the parties to a bond were not on an equal footing or

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No.

CONTRACT ACT, 1872—*contd.*

that the obligor did not fully understand the transaction, or was in the clutches of an extortionate money-lender, the mere fact that the rate of interest was high is insufficient to raise a presumption of undue influence such as is contemplated in Section 16 of the Contract Act. When under the terms of a bond the interest chargeable cannot be regarded as a penalty, the terms of the bond must be enforced. Indian Courts cannot interfere at discretion merely on the ground that a bargain is hard and unconscionable.

Gokal Chand v. Khwaja Ali Shsh (32 P. R., 1890), followed. *Edulji v. McDonald* (55 P. R., 1901) referred to. *BELAKI MAL v. T. G. ACRES*

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SECTION 23.

*Contract—Agreement by plaintiffs and defendants to purchase certain landed property at an auction jointly and not to bid against each other—Void contract—Public policy—Jurisdiction—Suit for possession of land—Value of subject-matter—Court Fees Act, 1870, Section 7, clause 10.—*Plaintiff sued for possession of $\frac{3}{11}$ ths share of certain plots of land sold at an auction by Government on the allegation that the plaintiffs and defendants before the action had entered into an agreement to buy the land in partnership, and thereafter to divide it, and that they had paid their *quotas* of the portion of the purchase money deposited on the day of the sale, and were willing to pay the balance, and had been wrongfully refused their share by the defendants. The first Court having decreed the claim, the Divisional Judge reversed it on the ground, amongst others, that the alleged agreement was void as opposed to public policy, inasmuch as the parties had agreed to purchase the property at the auction jointly, and not to bid against each other. Also found that the form of suit was really one for specific performance of a contract in writing, and that the first Court had no jurisdiction to try it.—*Held*, that under the circumstances of the case the agreement was perfectly lawful, and one that should be enforced, being more in furtherance of public policy than against it.—*Held*, also that clause 10 of Section 7 of the Court Fees Act was not applicable, as there was no agreement to perform. The defendants had already performed the contract they had made to buy the property, and the title vested in the plaintiffs as soon as the purchase was effected, and they had become joint-owners with the defendants, and thirty times the *jama* of the $\frac{3}{11}$ ths share of the property which was sued for being Rs. 932, the first Court had jurisdiction to try the suit.

Ballah Mal v. Bhupa Mal (110 P. R., 1888) (F. B.), *Hari Balkrishna Joglekar v. Nuro Mureshvar Joglekar* (I. L. R. XVIII Bom., 342), *Durga Singh v. Sheo Pershad Singh* (I. L. R., XVI Cal., 194), and *Gobind Chandra Gongapadhyay v. Sherajunnissa Bibi* (13 C. L. R., 1), followed. *Chunibai v. Secretary of State* (Bom., P. J., 204), referred to. NANDA SINGH v. SUNDER SINGH

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No.

CONTRACT ACT, 1872—concl'd.

SECTION 30.

And Section 213—Principal and agent—Badni (wagering) contracts—Void contract—Suit for profits received by defendants as plaintiff's agents—Liability of agent to render accounts to his principal.—Defendants as plaintiff's agents arranged with third parties for the delivery to plaintiff of 20,000 maunds of gram on a certain date, and three weeks after sold the said gram as his agents at a profit, the plaintiff sued the defendants for differences between the purchase and sale price, after deducting the commission to which the defendants were entitled. The defendants admitted the purchases and sales, but pleaded that the transactions were *badni*, and that they had realized no profits. *Held*, that as there was never any intention that the gram should be delivered, and it was only intended that differences should be settled, the transactions were *badni* and void under Section 30 of the Contract Act, but not illegal, and the defendants were liable to the plaintiff for any profits received by them. The defendants as agents being bound to render proper accounts to the plaintiff, under Section 213 of the Act, which they had failed to, and in the absence of any objection on their behalf as to the amount of profits calculated, the plaintiff was entitled to a decree for the amount claimed.

Ragnath Sahai v. Mamraj (80 P. R., 1895), and *Telu Mal v. Subha Singh* (90, P. R., 1880), followed; *Doshi Talakshi v. Shah Ujamsi Velsi* (I. L. R., XXIV Bom., 227), distinguished. DEBI SAHAI v. GANESHI LAL AND OTHERS 46

SECTION 74.

And Section 16—Undue influence—Penalty—Unconscionable bargain—Interest.

See *Contract Act, 1872, Section 16, No. 2.*

SECTION 213.

1. *And Section 30—Principal and Agent—Badni contracts—Suit for profits received by defendants as plaintiff's agents—Liability of agent to render accounts to his principal.*

See *Contract Act, 1872, Section 30.*

2. *And Section 258.—Partnership—Suit by partner against co-partner who was also manager of the business to have an account rendered of his stewardship—Accounts without dissolution.*

See *Partnership, No. 2.*

CO-SHARER.

1. *Suit by some of the several co-sharers against the trespasser affecting common land—Effect of non-joinder of other co-sharer—Civil Procedure Code, 1882, Section 30—Decree, form of.*

See *Common Land, No. 4.*

The references are to the Nos. given to the cases in the "Record."

No,

CO-SHARER—*conclld.*

2. *Pre-emption—Sale of sharer of joint estate—Vendor, purchaser and pre-emptor all three being co-sharers in the joint estate—Vendor's selection where parties are equally entitled—Punjab Laws Act, 1872, Section 12 (a).*

See *Pre-emption*. No. 18.

CONTRIBUTION, SUIT FOR—

*Joint wrong-doers—Decree for damages—Suit not maintainable.—*H. S. and others brought a suit against the plaintiff and defendants in the present suit for possession of a plot of land, damages for demolition of a wall, and removal of building materials. In that suit the parties to the present dispute denied H. S.'s title, and the other allegations in his plaint; but the suit was decreed with costs and Rs. 50 damages, the whole of which were realized from the plaintiff who brought the present suit for contribution against his former co-defendants. The lower Court found that as the plaintiff and defendants knew perfectly well that they were both acting wrongfully, and had filed a false defence in the former suit, disallowed the present claim.

Held, that the suit for contribution was not maintainable, the parties being joint wrong-doers in the common sense of the word as well as in law.

Haramoni Dassi v. Hari Churn Chowdhry (I. L. R., XXII Calc., 833), *Gobind Chunder Nandy v. Srigobindh Chowdhry* (I. L. R., XXIV Calc., 339), *Vayangara Vadaka Vittal Manja v. Pariyango Padlingara Kuruppoth Kadugochen Nayar* (I. L. R., VII Mad., 89), *Fakire v. Tassaddug Hussain* (I. L. R., XIX All., 462), followed; *Sreeputty Roy v. Loharam Roy* (7 W. R., 384) referred to, and *Ruthu Sirdar v. Shujoo Parawanik* (20 W. R., 235) distinguished. *SUDHU SINGH v. LEHNA SINGH AND OTHERS* 7

COURT FEES ACT, 1870.

SECTION 7, clause 10.

Jurisdiction—Suit for possession of land—Value of subject-matter.

See *Contract Act*, Section 23.

CUSTODY OF MINOR.

Guardian—Appointment of—Guardian and Wards Act, 1890, Section 17—Application by a Muhammadan maternal grandmother to be appointed guardian of her Muhammadan minor grandchildren who were in the custody of their father, who had changed his religion—Father's right to custody—Act XXI of 1850, Section 1—Interpretation of the expression "rights"—Equity.—Held, that the law in India, while placing all religions on a level before the law, and allowing to the fullest extent the rights of aggregations of individuals to be governed by their own

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CUSTODY OF MINOR—*concl.*

personal law, protects individuals so far as may be from the loss of either rights or property by reason of renunciation of, or exclusion from, any religion or caste.

Held, also, that the expression "rights" in Section 1 of Act XXI of 1850 includes something more than actual rights in property, and that the right to the guardianship and custody of his children by a Muhammadan who has been converted to Christianity is a right within the meaning of Act XXI of 1850.

Held, further, that the father, who was the only living parent and who had the custody of his children, and was making suitable provision for their up-bringing, should not lose his natural rights on the ground of change of his religion. GUL MUHAMMAD v. MUSSAMMAT WAZIR BEGAM 60

CUSTOM.

1. *Presumption in favour of the existence of a custom*—Non-agriculturists—Onus probandi.—Where *prima facie* it is apparent that the parties to a suit were not ordinary agriculturists, or carrying on the pursuit of agriculture, but had been employed for generations in state service, there is no initial presumption in favour of the existence of a custom under Section 5 (a) of the Punjab Laws Act, 1872. In such cases it should be ascertained whether the rule of descent is governed by custom or by the personal law of the parties. MUSSAMMAT FATIMA AND OTHERS v. ARJMAND ALI 41

2. *Persons not bound by general agriculturist's customs in matters of succession and alienations*.—Khatri, although following agricultural pursuits, cannot be presumed to have adopted the general customs of agriculturists in matters of succession and alienations, and the record-of-rights cannot operate to make a Khatri proprietor an agriculturist subject to custom which govern the latter. The presumption is that a Khatri is only bound by so much of the record-of-rights as deals with pre-emption and similar customs. HARNAM SINGH v. DEVI CHAND... .. 107

CUSTOM—I. ADOPTION.

1. *Custom—Adoption—Dhawan Khatri of Ferozepore—Wife's sister's son—Ceremonies*.—*Found*, that adoption of wife's sister's son among Dhawan Khatri of Ferozepore was not opposed to custom or Hindu Law, and that, in the absence of proof as to the necessity of ceremonies in constituting such an adoption valid, an unequivocal declaration of intention, coupled with previous and subsequent treatment, would be sufficient for the purpose.

Ganda Mal v. Mussammat Radhi (57 P. R., 1886) referred to. GIREHARI LAL v. DALLA MAL, 3

The references are to the Nos. given to the cases in the "Record."

No.

CUSTOM—I. ADOPTION—*contd.*

2. *Custom—Adoption—Gift to daughter's son—Kothana Gujars of the Gujrat tahsil—Limitation—Limitation Act, 1877, Schedule II, Article 118—Suit to declare an adoption invalid.*—In a case the parties to which were Kathana Gujars of the Gujrat tahsil, found, that an adoption of a daughter's son, or a gift of ancestral land to such a person by a sonless proprietor without consent of collaterals was invalid by custom.

Article 118 of the second schedule of the Limitation Act of 1877 is not applicable where the adopter has no inherent power to adopt.

Bhugat Ram v. Talsi Ram (144 P. R., 1892) followed; *Jayadamba Chowdhurani v. Dekhina Mohum* (I. L. R., XIII Cal., 308) distinguished; *Gul Ahmad v. Sahibzada* (45 P. R., 1881), doubted; *Ham Din v. Mubarak* (140 P. R., 1893), *Gaman v. Nadir Din* (35 P. R., 1896), *Nur Din v. Sahibzada* (18 P. R., 1880), *Fazla v. Fazla* (53 P. R., 1889), and *Muhammad v. Sharif Din* (8 P. R., 1891) referred to. MUHAMMAD DIN AND OTHERS v. SADAR DIN AND OTHERS

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3. *Custom—Adoption—Gift—Kathana Gujars of the Jhelum tahsil.*—In a suit, the parties to which were Kathana Gujars of the Jhelum tahsil, found that adoption is not recognized in that tribe, and that a gift of ancestral land by a widow in favour of one reversioner in presence of other reversioners of equal degree is invalid.

Ham Din and others v. Mubarak and another (140 P. R., 1893), *Gaman and another v. Nadir Din and others* (35 P. R., 1896), *Sahib Din and others v. Amira and others* (16 P. R., 1889), and *Muhammad and others v. Sharaf-ud-din and others* (8 P. R., 1891), referred to. JUMMA AND OTHERS v. MUBARIK AND OTHERS

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4. *Custom—Adoption—Adoption of sister's son—Acharjya Brahman of Goler in the Dehra tahsil of the Kangra district—Burden of proof.*—One R. D., an Acharjya Brahman of Goler, in the Dehra tahsil, of the Kangra district, executed a deed of adoption in favour of 'K,' his sister's son, reciting that K had been adopted when two or three years old, and had ever since been treated as a son. Plaintiffs, collaterals of R. D., sued for a declaration setting aside the deed on the grounds that K. was, in fact, never adopted, and that the adoption was invalid by custom and Hindu Law. The first Court found that the adoption was not opposed to custom, but that there was in fact no adoption as recited in the deed, though K. had lived with R. D. for many years and assisted him in his business, and gave plaintiffs a decree that K. was not the adopted son of R. D. The Divisional Judge on appeal reversed the decree, on the ground that the *factum* of adoption had been clearly established, and further that by custom the adoption was valid. The plaintiffs preferred a further appeal against these findings to Chief Court.

Held, that where the parties are not members of an agricultural tribe or land-holding group, and where no ceremonies are essential, and the adoption not opposed to custom, a declaration by deed, if coupled with previous and subsequent treatment as an adopted son, was sufficient to constitute adoption.

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CUSTOM—I. ADOPTION—*concl'd.*

Held, also, that in cases where the right of adoption is admitted or is found to prevail and the parties are not members of an agricultural tribe, or land-holding group, the burden of proof ought to lie on those who deny that a particular kind of adoption, *e. g.*, that of a daughter's sister's son, cannot be made.

Found, upon the evidence that plaintiffs had failed to prove that by custom among Acharjya Brahmins of Kangra (who are not members of an agricultural tribe or land-holding group) the adoption of a sister's son was invalid.

Ralla v. Budha (50 P. R., 1893, F. B.) distinguished, and the subject of adoption among non-agricultural twice-born Hindu classes in the Punjab discussed. SOHNUN AND OTHERS *v.* RAM DIAL AND OTHERS ... 79

5. *Custom—Adoption—Daughter's son—Hindu Jats of Hayatpur in the Garhshankar tahsil of Hoshiarpur district—Suit to obtain a declaration that an alleged adoption was invalid or had never taken place—Limitation from which period begins to run—Limitation Act, 1877, Schedule II, Article 118—Burden of proof.*—On the 28th August 1884 one K executed a deed of adoption in favour of his daughter's son. In 1894, after the death of K, his widow assented to mutation of names being effected in favour of the adopted son. In 1897 the plaintiffs, who are the male collaterals of K, instituted a suit to obtain a declaration that the alleged adoption was invalid, and that it never took place. The first Court found that the plaintiffs' claim was barred by limitation, that the defendant was adopted by K, and that the adoption was not invalid. The Divisional Judge reversed the decree of the first Court on the grounds that the fact of the widow of K. allowing mutation in favor of the adopted son gave plaintiff a fresh cause of action, and that the defendant was not formally adopted, and that as a daughter's son he could not be adopted.

Held, that as the title of the adopted son to the property was created by the adoption, and not by any subsequent admission on the part of the widow of the adoptive father that the title existed, such an admission did not give plaintiff any fresh cause of action, and as the plaintiffs had knowledge of the adoption more than six years previous to the institution of the suit their claim was barred under Article 118 of the second schedule to the Limitation Act of 1877.

Held, also, that although a presumption at the outset is against the power of an adoption of a daughter's son, in a case where evidence such as an entry in a *Wajib-ul-arz* or *Riwaj-i-am* or precedents are produced by the adopted son, the burden of proof is shifted to the party denying the validity of such an adoption.

Found, upon the evidence that the defendant was formally adopted by K, and that his adoption was valid.

Parman v. Gian Singh (94 P. R., 1893), *Natha Singh v. Sujan Singh* (34 P. R., 1899), and *Ralla v. Budha* (50 P. R., 1893), referred to. HEM RAJ AND ANOTHER *v.* SAHIBA AND OTHERS ... 116

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No.

CUSTOM—II. ALIENATION.

1. *Custom—Alienation—Alienation by widow—Locus standi of reversioners of the fifth degree—Domra Jats of the Dera Ismail Khan tahsil.—Found, that there was an established custom amongst Domra Jats of the Dera Ismail Khan tahsil that no male collateral, not descended from a common great-grandfather, along with a deceased person, whose widow had alienated the deceased's property, had a right to object to such alienation.*

Rahmat Hussain and others v. Mussammat Fahim-un-Nissa (25 P. R., 1895), referred to. *DILAWAR v. MUSSAMMAT JATTI* 2

2. *Custom—Alienation—Gift by a sonless proprietor in favour of daughter—Banda Rajputs of Luthiana City known as Malak Rajputs in Jullundur City—Right of widow of a collateral—Accretion from ancestral property—Hindu Law.—Held, in a suit by a collateral to question an alienation, that on the death of the plaintiff during the pendency of the suit, his widow was entitled to represent her husband, and to proceed with the suit instituted by him. Mussammat Rakhi v. Mussammat Fatima* (89 P. R., 1892), and *Mussammat Aso and another v. Mussamat Tabi and another* (77 P. R., 1893), distinguished.—*Held, also, that the parties, though residents of a city, being agriculturists, were governed by custom, and that the donor was competent, under the custom prevalent amongst his tribe, to transfer his self-acquired immovable property by gift to his daughter.*

The rule of Hindu Law, that, as accretions from ancestral property, the acquisitions are themselves ancestral, cannot be applied to those who are governed by custom.

Mussammat Fakharrunnissa v. Malik Rahim Bakhsh (23 P. R., 1897), *Nura v. Toru* (46 P. R., 1900), *Ghausu v. Nathu* (82 P. R., 1900), *Deri Bitta and others v. Mussammat Hukmi and others* (85 P. R., 1900), *Iehna and another v. Mussammat Thakri* (32 P. R., 1895), *Muhammad Kalu Khan v. Saif-ulla Khan* (91 P. R., 1887), referred to. *NAWAB-UD-DIN v. MUSSAMMAT KAMI* 12

3. *Custom—Gift—Validity of gift to one of several heirs—Kang Jat of Garhshankar tahsil, Hoshiarpur District.—In a suit the parties to which were Kang Jats of the Garhshankar tahsil, Hoshiarpur District, a gift by a sonless proprietor of his land to one of his heirs who had been for a long time cultivating with and supporting the donor, to the exclusion of the rest, was found valid by custom.*

Sobha v. Gyana (116 P. R., 1886), *Gopal Singh v. Kheman* (85 P. R., 1889), *Indar v. Luddar Singh* (18 P. R., 1890), *Sher Singh v. Sohail Singh* (19 P. R., 1890), *Karim Bakhsh v. Fatta* (113 P. R., 1891), *Narain Singh v. Gurmukh Singh* (116 P. R., 1894), *Nanda v. Mian Khan* (101 P. R., 1892), and *Sahib Din v. Amira* (16 P. R., 1889) referred to. *RALA v. BANNA AND OTHERS* 14

The references are to the Nos. given to the cases in the "Record."

No.

CUSTOM—II. ALIENATION—*contd.*

4. *Custom—Alienation—Alienation by a childless adopted son of his adoptive father's property—Distinction between the right to alienate the property acquired from adoptive and a natural father.—Held*, that under the Customary Law of Punjab the right to alienate ancestral property is the same whether the property dealt with comes from a natural or an adoptive father, the only distinction which exists between the estates of the adopted son in the two classes of property is with reference to the devolution of each on his death, childless and without a widow. *FATTEH SINGH v. NIHAL SINGH* 25
5. *Custom—Alienation—Will—Will in favor of daughter's son—Awans of Shahpur District—Competency of proprietor to make a will in favor of his daughter's son in the presence of his own brother.—Held*, that the right to make a bequest by a will exists among the Awans of the Shahpur District, and that a bequest by a sonless proprietor in favour of his daughter's son is valid by custom in the presence of his own brother. *ALI MUHAMMAD v. DULLA* 26
6. *Custom—Alienation—Gift—Immoveable property—Gift without delivery of possession—Revocation of gift by donor—Hindu Law.—Held*, that the primary rule of decision in a case of gift in the Punjab is custom, and possession is ordinarily necessary to complete it, and that even under Hindu Law a gift which the donor repudiated immediately after, and which he did not do all in his power to perfect and which he did not give actual possession of the gifted property, is not valid.
- Balmokand v. Bhaqwan Das* (I. L. R., XXI All., 185), *Mamblhari v. Nannidh* (I. L. R., IV All., 40), *Raja Ram v. Ganesh* (I. L. R., XXIII Bom., 131), *Parema Shah v. Chet Ram* (38 P. R., 1899), distinguished. *Kalidas Mullick v. Kanhaya Lal Pandit* (I. L. R., XI Cal., 121), relied on. *CHAUDHRI LILA KISHEN AND OTHERS v. CHAUDHRI HOA RAM* 45
7. *Custom—Alienation—Alienation by father of ancestral land—Objection by sons—Lohars of Jamsher, tahsil Jullundur, District Jullundur.—Held*, that the plaintiffs and their fathers having actually cultivated land for a considerable period, extending over several generations, though *lohars*, had become agriculturists, and even thus governed by the custom prevailing amongst agricultural tribes, which limits the alienation of ancestral agricultural land, and were entitled to question the alienation by their father.
- Khazan Singh and others v. Maddi and others* (122 P. R., 1893), *Gurmukh v. Ganga Ram* (81 P. R., 1895), *Uttam Singh v. Jhanda Singh* (21 P. R., 1896), and *Ram Mal v. Mussammat Miran* (30 P. R., 1896), referred to. *KAKA AND OTHERS v. RANJIT SINGH AND OTHERS* ... 51
8. *Custom—Gift—Validity of gift to a near agnate not actually an heir of the donor—Dhat Jats of Tahsil and District Hoshiarpur.—In a suit by a nephew of the donor to set aside a gift made by his uncle on account of services rendered to him in favour of a near agnate, who was not actually his heir, the parties being Dhat Jats of the Hoshiarpur tahsil, held*, that the gift was valid by custom,

The references are to the Nos. given to the cases in the "Record."

No.

CUSTOM—II. ALIENATION—*contd.*

Bhagwana v. Mothu (62, P. R., 1884), *Sobha v. Gyana* (116, P. R., 1886), *Gopal Singh v. Kheman* (85, P. R., 1889), *Indar v. Luddar Singh* (18, P. R., 1890), *Sher Singh v. Sohail Singh* (19, P. R., 1890), *Narain Singh v. Gurmukh Singh* (116, P. R., 1894), and *Rala v. Bauna* (14, P. R., 1901), referred to. ATMA SINGH AND ANOTHER v. NAUDH SINGH ... 61

9. In a suit the parties to which were Kathana Gujars of the Jhelum tahsil found that a gift of ancestral land by a widow in favour of one reversioner in the presence of other reversioners of equal degree is invalid. JUMMA v. MUBARIK 70

10. *Custom--Alienation - Will--Pathans of Peshawar District--Found*, that by the custom prevailing among Pathans of the Peshawar District, a father is competent to make an unequal distribution of his immovable property among his sons by will. SHAD ADI KHAN v. ABDUL GHAFUR KHAN AND ANOTHER 80

11. *Custom--Alienation - Gift to a nephew of immovable property inherited from an uncle--Ancestral property.*—In a case in which the self-acquired property of an uncle was inherited by his nephews on his dying childless, held, that the said property was not ancestral property, *qua* the sons of those nephews, as it was not inherited from a direct male ancestor, and that a gift of such property by the nephews to their sister's son was not invalid by custom.

Balki and others v. Biranand and others (43, P. R., 1890), and *Jowahir Singh v. Lial Singh and others* (76, P. R., 1898) cited. JHANDA SINGH AND OTHERS v. GURMUKH SINGH 93

12. *Custom--Alienation by male proprietor--Necessity--Antecedent just debts.*—In a case where a minor son sued to set aside his father's alienations on the ground of non-receipt of consideration and want of necessity—held, that the father having himself admitted receipt of consideration and having given possession and mutation of names raised a strong presumption that consideration had been received; and, as regards necessity, it being shown that the father had only a small estate and large expenses, and it not being shown that he lived in an extravagant way, the previous debt to the vendee should be held to have been incurred for the usual necessary requirements of an agriculturist. PIRAN DITTA v. MOTI AND OTHERS 97

13. *Sale by sonless proprietor to stranger--Locus standi of reversioner Bhandari Khatri of Vairawal, tahsil Tarn Taran, District Amritsar--Burden of proof--Agricultural tribe--Record-of-rights.*—Khatri, although following agricultural pursuits, cannot be presumed to have adopted the general customs of agriculturists in matters of succession and alienation, and the record-of-rights cannot operate to make a Khatri proprietor an agriculturist subject to customs which govern the latter. The presumption is that a Khatri is only bound by so much of the record-of-rights as deals with pre-emption and similar

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customs. The burden of proof therefore that a Khatri in matters such as alienation or succession is governed by custom rests always on the party alleging that he is so bound.

Found, upon the evidence that plaintiff had failed to establish that a sonless Bhandari Khatri of Vairawal in the Taran Tarn *tahsil* of the Amritsar District was governed by a custom prohibiting alienation by him of ancestral land without the consent of his collaterals.

Mussammat Pal Devi v. Fakir Chand (60, P. R., 1895), *Jiwan v. Hakam Khan* (140, P. R., 1894), *Uttam Singh v. Jhanda Singh* (21, P. R., 1896), *Hashim v. Nathu* (13, P. R., 1900), *Kartar Singh v. Mather Singh* (94, P. R., 1898), *Khazan Singh v. Maddi* (122, P. R., 1893) and *Kanshi Ram v. Jiwan* (82, P. R., 1890), referred to. HARNAM SINGH v. DEVI CHAND... ..

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14. *Custom—Alienation—Alienation of occupancy rights Right of reversioner to restrain such alienation—Burden of proof—Punjab Tenancy Act, 1837, Sections 53, 56, 60.—Held*, that when a collateral of an occupancy tenant seeks to restrain an alienation which has not been objected to by the landlord he has to prove the existence of a custom by which he is entitled to do so, *i. e.*, the burden of proof is upon the collateral asserting the rights to restrain the alienation.

Karam Din v. Sharaf Din (89, P. R., 1898), and *Kilaru v. Bannu* (31, P. R., 1896), referred to. FAIZ BAKHSH AND OTHERS v. DITTA AND OTHERS

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CUSTOM—INHERITANCE.

1. *Widow of pre-deceased son—Non-agriculturist, Gahi Khatri of Aklaba, Ludhiana District.*

See *Hindu Law—Inheritance.*

2. *Custom—Succession—Succession of daughter—Sheikhs of Badli, Rohtak District—Non-agriculturists—Onus probandi—Punjab Laws Act, 1872, Section 5.—In a suit the parties to which were Sheikhs of the village of Badli, in the Rohtak District, found*, in the absence of a custom to the contrary, that the daughters succeed in preference to collaterals such as the defendants. Where *prima facie* it is apparent that the parties to a suit were not ordinary agriculturists or carrying on the pursuit of agriculture, but had been employed for generations in State service, there is no initial presumption in favour of the existence of a custom under Section 5 (a) of the Punjab Laws Act, 1872. In such cases it should be ascertained whether the rule of descent is governed by custom or by the personal law of the parties. MUSSAMMAT FATIMA AND OTHERS v. ARJMAND ALI AND OTHERS

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3. *Custom—Succession—Chundavand and pagvand—Bedi Khatri of mauza Chavinda, tahsil Zafarwal, Siakot District.—In a case to which the parties were Bedi Khatri of mauza Chavinda, Zafarwal*

The references are to the Nos. given to the cases in the "Record."

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CUSTOM—INHERITANCE—*contd.*

tahsil, Sialkot District, *found*, that the plaintiff had failed to establish his allegation that the parties were governed by the *Chundavand* rule.
BAWA SANT SINGH *v.* GANA SINGH AND OTHERS 47

4. *Custom—Agriculturists—Succession to the estate of a female inherited from her father.*—In a suit for succession of land left by a female who had inherited it from her father, and who first married her cousin and by him had a son, and who after her first husband's death married another man by whom she had three sons.—*Held*, that the son of the first marriage could not exclude the sons of the second marriage on the ground that he was the collateral of the original owner. The collaterals of a deceased person who has been succeeded by a female as his heiress have no *locus standi* with regard to his property so long as the female's male linal descendants are in existence.
ALAM AND OTHERS *v.* AKBAR ALI 52

5. *Custom—Inheritance—Unchastity of widow—Effect of, in regard to estate vested in her—Hindu Law.*—A Hindu widow who had inherited the estate of her deceased husband in the absence of a special custom to the contrary is not liable to forfeit that estate by reason of her unchastity after the death of her husband.

Fatfeh Singh and another v. Kalu and another (107, P. R., 1888), and *Moni Ram Kolita v. Keri Kolitani* (I. L. R., V Cal., 776, P. C.), followed. MUSSAMMAT ATRI *v.* DIDAR SINGH AND OTHERS 76

6. *Custom—Inheritance—Pathans of Desu in the Chach ilaqa of the Rawalpindi District—Special family custom—Burden of proof.*—*Held*, that a party relying upon a special family custom, such as that only one son of the last owner, *viz.*, the fittest or the eldest, succeeds to the whole estate, the others getting only maintenance, must prove that such custom was ancient, invariable and definite.

Held, on the evidence, the acts of the principal defendant, the manner of succession to the estate, and the shares enjoyed by members of the family at different times, that such custom, even if it was once in force, has been abrogated or abandoned, and that the family was bound by the ordinary rule of inheritance, *i.e.*, equal succession of all the sons.

Ramalakshmi Ammal v. Siranantha Perumal Sethuroyar (14, Moo. I. A., 570), *Bhau Nanaji Utpal v. Sundrabai* (XI Bom., H. C. R., 249), *Raj Kishen Singh v. Ranjoy Surma Mozoomdar* (I. L. R., I Cal., 186, P. C.), *Jowala Baksh v. Dharam Singh* (10 Moo. I. A., 511, 537) and *Hakim Khan v. Gul Khan* (I. L. R., VIII Cal., 826), followed. ZARIF KHAN *v.* AMIR KHAN AND OTHERS 85

7. *Custom—Inheritance—Koreshis of Gujranwala—Muhammadan Law.*—In a suit the parties to which were Koreshis of the town of Gujranwala and not agriculturists, and the property in dispute was situate in that town, *found*, in the absence of a special custom to the contrary, that the rule of inheritance was governed by Muhammadan Law.

The references are to the Nos. given to the cases in the "Record."

No.

CUSTOM—INHERITANCE—*contd.*

Ahmad Din v. Mussammat Fazlan (175, P. R., 1883), cited. MUSSAMMAT KARAM BIBI AND OTHERS *v.* HUSSAIN BAKHSH AND ANOTHER ... 92

8. *Custom—Inheritance—Gardezi Sayads of Mooltan District—Widow's right of inheritance—Muhammadan Law—Wajib-ul-arz—Application of Wajib-ul-arz to an owner who is not specifically mentioned therein.*—In a suit the parties to which were Gardezi Sayads of the Mooltan District, found, that the parties were governed as regards the matter in question by custom, and not by Muhammadan Law, and that among them a sonless widow was entitled to succeed to her husband's estate for life.

The *Wajib-ul-arz* of a village should be presumed to apply to all landowners in the village as a body unless specifically exempted.

Mussammat Ghulam Zohra v. Rukn Abdullah Shah (18, P. R., 1889) followed, and *Mussammat Sardar Bibi v. Sayad Ali Shah* (4, P. R., 1888), distinguished. SAYAD RAHIM SHAH AND OTHERS *v.* SAYAD HUSSAIN SHAH AND OTHERS ... 102

9. *Custom—Inheritance—Right of married daughters—Khanadamad—Exclusion of brothers and nephews—Muhammadan Bangial Jats of Kharian tahsil, Gujrat District.*—Among Bangial Jats of Kharian tahsil, Gujrat District, by custom a married daughter is entitled to succeed her father, a sonless proprietor, who settled her and her husband in his house in order that they might perform services for him and manage his cultivation, intending to pass his estate to her and her sons to the exclusion of his brothers and nephews, even though the daughter's husband had been a resident son-in-law in his first wife's family, where the first father-in-law died before the second marriage.

Shah Muhammad v. Mussammat Imam Bibi (56, P. R., 1878), *Karim Bakhsh v. Haku* (24, P. R., 1879), *Mehr Din v. Mussammat Niki* (67, P. R., 1882), *Muhammada v. Mussammat Gaurian* (162, P. R., 1882), *Nathu v. Mussammat Karam Bhari* (15, P. R., 1884), *Jowaya v. Mussammat Fazalan* (45, P. R., 1885), and *Mussammat Baggi v. Mamun* (31, P. R., 1895), cited. SAMMAN AND OTHERS *v.* ALA BUKHSH AND ANOTHER ... 106

10. *Custom—Inheritance—Channar Jats of tahsil Lodhran, District Mooltan—Exclusion of collaterals by sister of deceased—Muhammadan Law—Burden of proof—Riwaj-i-am—Punjab Laws Act, 1872, Section 5.*—Held, that in a suit the parties to which were Channar Jats of tahsil Lodhran, District Mooltan, that the burden of proof lay, in the first instance, on the sister claiming in opposition to the collaterals, but, that the rules of inheritance detailed in the *Riwaj-i-am* of the tahsil were sufficient to shift the burden of proof, and that the collaterals having failed to establish a custom by which the collaterals descended from the great-great-grandfather of the deceased owner were entitled to inherit landed property in preference to a sister, and that in the

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absence of a proved positive custom regulating their rights, rules of Muhammadan Law must be followed in accordance with the provisions of Section 5 of the Punjab Laws Act, 1872.

Mussammat Sardar Bibi v. Sayad Ali Shah (4, P. R., 1888), and
Nasir-ud-din Shah v. Mussammat Lal Bibi (89, P. R., 1888), cited.
SHERAN AND OTHERS v. MUSSAMMAT SHARMAN 117

CUSTOM—PRE-EMPTION.

See *Pre-emption*.

D.

DAMAGE.

1. *Erection of kotha on Gora-deh by non-proprietary resident with the permission of a proprietor in possession—Absence of special damage.*

See *Common Land*, No. 2

2. *Easement—Obstruction to private right of way—Necessity of special damage.*

See *Easement*.

DAMAGES.

See *Interest*.

1. *Injunction when to be granted—Discretion of Court—Damages.*

See *Common Land*, No. 3.

2. *Suit for malicious prosecution—Reasonable and probable cause—Malice—Conviction of plaintiff by two Courts—Damages—Measure and assessment of damages.*

See *Malicious Prosecution*.

DECLARATORY DECREE.

Suit for a declaration that the defendant is not the lawful wife of the plaintiff—Jurisdiction of Civil Court to entertain such a suit when an order for maintenance passed under Section 488 of the Criminal Procedure Code is in force against the plaintiff.

See *Jurisdiction*, No. 10.

DECREE.

1. *Execution of—Power of Court to execute decree in excess of the limits of its pecuniary jurisdiction as an original Court.*

See *Civil Procedure Code*, 1882, Section 6.

2. *Jurisdiction of District Judge to re-open an ex-parte decree which was appealed against to the Chief Court by the plaintiff.*

See *Civil Procedure Code*, Section 108.

The references are to the Nos. given to the cases in the "Record."

	No.
DECREE— <i>concl'd.</i>	
3. <i>Form of decree in suit where some of the several co-sharers sue a trespasser affecting common land.</i>	
See <i>parties</i> , No. 4.	
4. <i>Registration of decree of Civil Appellate Court in Revenue Appellate Court—Punjab Tenancy Act, 1887, Section 100.—Where a suit, cognizable by a Revenue Court only, had been instituted in and decided by a Civil Court, the decree of which had been affirmed by a Civil Appellate Court.—Held, that, inasmuch as the parties did not appear to have been prejudiced by the mistake as to jurisdiction, the proper course to adopt was to order that the decree of the Civil Appellate Court be registered in the Revenue Appellate Court.</i> RAO <i>v.</i> HAR DIAL ...	31
5. <i>Execution proceedings—Jurisdiction of Court to entertain application after full satisfaction of the decree being entered.—Section 244 of the Civil Procedure Code does not apply to a Court which has fully executed a decree and has thereby become functus officio, it applies only to a Court executing a decree at the time when an application connected with execution is made.</i> CHAUDRI GURMUKH SINGH <i>v.</i> MUSSAMMAT MIRZA NUR ...	63

DISMISSAL OF SUIT.

<i>Dismissal of suit for non-appearance of parties on the day fixed for delivery of judgment—Civil Procedure Code, 1882, Section 198.—Held, that there is no rule of procedure to justify a Court in dismissing a suit for non-appearance of the parties on the day fixed for delivery of judgment.</i> JIWANDA MAL <i>v.</i> MUHAMMAD ALI ...	82
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DIRECTORS.

Power and authority of—Public Company—Articles of Association—Ratification by Company of acts ultra vires of Directors.

See *Public Company*.

E.

EASEMENT.

*Easement—Private right of way—Obstruction—Special damage. Necessity of—Injunction.—In order to maintain an action for obstructing a way, a person must suffer some substantial damage peculiar to himself, beyond that suffered by the rest of the public who use the way, where the respondent purchased a *tavela* from the appellant about 25 years before suit, and the appellant had within two years of the suit obstructed a way which had in the interval been used continuously by the respondent and others having business with him as the direct way to the *tavela*, and the only alternative way being circuitous and practically impassible for carts in wet weather, held, that the respondent had sustained a particular direct and substantial injury inasmuch as the value of the property (*tavela*) has been diminished by the obstruction, access thereto being necessary for the profitable enjoyment thereof, and was therefore entitled to maintain the suit.*

The references are to the Nos. given to the cases in the "Record."

No.

EASEMENT—*concl'd.*

Winterbottom v. Derby (I. L. R., 2 Ex., 316), *Ricket v. Metropolitan Railway* (34, L. J. Q. B., 257), *Siddeswara v. Krishna* (I. L. R., XIV Mad., 177), *Fattehzaib Khan v. Muhammad Yusaf* (I. L. R., XIX All., 434), and *G. I. P. Railway Company v. Auraji Pestanj* (I. L. R., X Bom., 390), referred to. JOWAND SINGH AND OTHERS v. SARDAR INDAR SINGH 64

EVIDENCE ACT, 1872.

SECTION 35.

And Sections 74, 80, 90—Public Record—Ancient documents—Presumption as to their genuineness—Production from proper custody—Mortgage—Acknowledgment of liability—Limitation Act, 1877, Section 19.—In a case where the question of age of a person at a certain time was disputed, *h-l'd*, that the descriptive roll of that person prepared by a public officer in accordance with the law in force at that time and a Patwari's statement about an entry in the Revenue papers (both of which documents were more than 50 years old) and the Municipal Register of Deaths were relevant under Section 35 of the Evidence Act, and being public documents within the meaning of clause (iii) (1) of Section 74 of that Act and produced from proper custody, presumed to be genuine. ANIS-UL-REHMAN KHAN AND OTHERS v. BENI RAM AND OTHERS 59

SECTION 92.

Mortgage or sale—Oral evidence to prove that an apparent sale was a mortgage—Admissibility of parol evidence to vary a written contract—Conduct of parties—Fraud or mistake.—Held, that under Section 92 of the Indian Evidence Act, 1872, oral evidence is not admissible to vary or alter the terms of a written contract in which there is no fraud or mistake, and in which the parties intended to express in writing what their words import, but that evidence of acts and conduct of the parties subsequent to the deed is admissible to show that something different from the written contract was intended by them.

Balkishen Das v. Legge (I. L. R., XXII All., 149), *Muhammad Ali Hussain v. Mir Nazar Ali* (V Calc., W. N., 326), and *Kashee Nath Chatterji v. Chundru Chorn Banerjee* (5, W. R., 68), followed. *Bhagwan Sahai v. Bhagwan Din* (I. L. R., XII All., 387) and *Ali Ahmad v. Rahmatulla* (I. L. R., XIV All., 195), referred to. *Baksu Lakshman v. Govindu Karji* (I. L. R., IV Bom., 594), *Behari Lal Bose v. Tejnarain* (I. L. R., X Calc., 764), *Hem Chunder Soor v. Kally Churn Das* (I. L. R., IX Calc., 528), *Venkatratnam v. Reddieh* (I. L. R., XIII Mad., 495), *Rakken v. Allagappudayan* (I. L. R., XVI Mad., 80), *Balkishen Das v. Legge* (I. L. R., XIX All., 434), *Preo Nath Shaha v. Madhu Sudan Bhuiya* (I. L. R., XXV Calc., 603), and *Govinda v. Jesha Premaji* (I. L. R., VII Bom., 73), dissented from. ABDUL GHAFUR KHAN v. ABDUL KADIR AND OTHERS 72

The references are to the Nos. given to the cases in the "Record."

No.

EXECUTION OF DECREE.

1. *Power of Court to execute decree in excess of the limits of its pecuniary jurisdiction as an original Court.*

See *Civil Procedure Code*, 1882, Section 6.

2. *Execution proceedings—Jurisdiction of Court to entertain application after full satisfaction of the decree being entered.*

See *Civil Procedure Code*, 1882, Section 244.

3. *Application for execution not in accordance with law—Step in aid of execution.*

See *Limitation Act*, 1877, Schedule II, Article 179.

F.

FORECLOSURE OF MORTGAGE.

See *Mortgage Nos.* 5, 7, 9, 10, 11, 13.

FRAUD.

1. *Suit for rectification of a deed on the ground of Limitation.*
See *Limitation Act*, 1877, Schedule II, Article 95.

2. *Mortgage for valuable consideration—Intent to defeat and delay a particular creditor.*

See *Mortgage*, No. 8.

G.

GUARDIAN AD LITEM.

Suit against minor—Application for appointment of guardian ad litem not filed with the plaint—Suit when instituted.

See *Limitation Act*, 1877, Section 4.

GUARDIAN AND WARDS ACT, 1890.

SECTION 12.

And Section 48—Order of District Judge fixing the fee of a custodian of the property of the ward appointed under Section 12—Appeal—Civil Procedure Code, 1882, Section 588 (24,—Revision—*Punjab Courts Act*, 1884, Section 70.

See *Appeal*, Civil, No. 1.

SECTION 17.

Guardian—Appointment of—Application by a Muhammadan maternal grandmother to be appointed guardian of her Muhammadan minor grandchildren who were in the custody of their father, who had changed his religion—Father's right to custody—Act XXI of 1850, Section 1—Interpretation of the expression "rights"—Equity.

See *Custody of Minor*.

The references are to the Nos. given to the cases in the "Record."

No.

H.

HINDU LAW—ADOPTION.

Adoption of wife's sister's son—Dhawan Khattris of Perotepore—Ceremonies.

See Custom—I. Adoption, No. 1.

HINDU LAW—ANCESTRAL PROPERTY.

Accretion from ancestral property.—The rule of Hindu Law, that, as accretions from ancestral property, the acquisitions are themselves ancestral, cannot be applied to those who are governed by custom.
NAWAB-UD-DIN v. MUSSAMMAT KAMI 12

HINDU LAW—ALIENATION.

Hindu Law—Alienation—Gift—Gift of immoveable property without delivery of possession—Revocation of gift by a donor.—Held, that under Hindu Law a gift which the donor repudiated immediately after, and which he did not do all in his power to perfect, and which he did not give actual possession of the gifted property, is not valid.—CHAUDHRI LILA KISHEN v. CHAUDHRI HOA RAM 45

Hindu Law—Alienation—Alienation by Hindu widow—Right of collaterals to question such alienation in presence of daughters and their sons—Burden of proof—Collusion—Maharotra Khattris of Mooltan city.—Plaintiffs, the brother and nephews of one "P," sued for a declaration that a gift of a house formerly the property of P, made by his widow to the Sanatan Dharm Sabha for the good of her soul and that of her husband, being without necessity, was inoperative so far as it affected their reversionary rights. The defendant pleaded that by special custom she had the power to alienate the property at pleasure, that under an oral will she had authority to do so, that the gift being for spiritual benefit of her late husband was justified by Hindu Law, and that the plaintiffs were not the next reversioners under custom, and that they could not sue in presence of daughters and their sons who would succeed after the widow. The first Court found all the points against the defendants and decreed the plaintiffs' claim. The Divisional Judge while agreeing with the first Court's finding on the first three points, disagreed with it on the fourth, holding that the plaintiffs upon whom the *onus* of proof lay have failed to prove that among non-agricultural Khattris of the Mooltan city the collaterals, not members of a joint family, succeeded to the self-acquired property of the deceased in preference to the daughters and their sons, and that, therefore, they as near collaterals had no *locus standi* in the presence of the daughters of the deceased and their sons, and cannot maintain a suit for a declaratory decree as sued for. On appeal by the plaintiffs to the Chief Court,

Held, that where the daughters and their sons are held to be the heirs of the deceased male proprietor, the collaterals cannot maintain their action unless they can prove that the abstention of their daughters and their sons who are heirs were in collusion with the widow, or did not sue for some improper and insufficient reasons.

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HINDU LAW—ALIENATION—*concl'd.*

Held, also, that where the daughters or their sons agreed to the widow making the gift of a portion of her deceased husband's property to a religious institution for the good of her soul and that of her husband, their agreement was an act of filial piety against their own interest, and was not collusion in the sense in which collusion would give collaterals a right to sue to set aside the alienation. *Bona fide* agreement in an act or recognition of the right of the person dealing with property to deal with it, as has been done in the present case, was not collusion, and does not give a more remote reversioner any right to sue for a declaratory decree that such act will not affect his rights.

Held, further, that no rule of custom governing the parties (who were Mahrotra Khatri of Mooltan city) being established, the burden of proof being on plaintiffs, the personal law of the parties must furnish the rule under the provisions of Section 5 of the Punjab Laws Act, under which law collaterals are excluded by daughters and their sons.—*WISHAN DAS AND OTHERS v. THAKAR DAS AND OTHERS*

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HINDU LAW—INHERITANCE.

1. *Inheritance—Unchastity of widow—Effect of, in regard to estate vested in her.*

See Custom—Inheritance, No. 5.

2. *Inheritance—Custom—Inheritance—Widow of pre-deceased son—Gahi Khatri of Aklaba, Ludhiana District—Hindu Law—Mitakshara.*—In a case the parties to which were non-agricultural Khatri of village Aklaba in the Ludhiana District, *held*, in the absence of a special custom, that succession was to be decided by the Mitakshara, under which law, as applicable to the Punjab, the widow of a pre-deceased son has no right to succeed to her father-in-law's property.

Held, also, that the defendant upon whom the *onus prolandi* rested had failed to prove that she (a daughter-in-law, whose husband had pre-deceased his father) was entitled by custom to succeed to her father-in-law's property.

Teja Singh v. Mussammatt Atri (115, P. R., 1893), *Mussammatt Rup Kaur v. Kishen Singh* (9, P. R., 1895), *Sohna v. Mussammatt Bhago* (50, P. R., 1897), *Bahadar Singh and others v. Mussammatt Nihali* (133, P. R., 1893), *Ananda Bibee v. Nownit Loll* (I. L. R., IX Cal., 315), *Jogadamba Koer v. Secretary of State for India in Council* (I. L. R., XVI Cal., 367), *Gauri Sahai v. Rukko* (I. L. R., III All., 45), and *Mari v. Chinnam Mal* (I. L. R., VIII Mad., 107), followed. *Lallubhai Bopubhai v. Cassibai* (I. L. R., V Bom., 110), and *Madhovram Mujutram v. Dave Trambaklal Bhawanishankar* (I. L. R., XXI Bom., 739), disapproved. *Mussammatt Chand Kaur v. Ram Singh and others* (20, P. R., 1895), distinguished.—*RADHA MAL v. MUSSAMMAT KIRPI AND OTHERS*... ..

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The references are to the Nos. given to the cases in the "Record."

No.

HINDU LAW—JOINT FAMILY.

1. *Hindu Law—Joint family—Presumption of joint ownership—Necessity for certificate.*

See *Succession Certificate Act, 1889, Section 4.*

2. *Hindu Law—Mitakshara—Joint Hindu family—Alienation of ancestral property—Suit by son against his father and a mortgagee for declaration that the mortgage entered into by his father should not affect his rights—Present payment—Legal necessity—Liability of son for father's debts.*—In a suit filed by a son for a declaration that a mortgage of ancestral property executed by his father for an advance which was made at the time of the mortgage and which was not for any family necessity should not affect his rights, *held*, that the mortgage not being for an antecedent debt was not binding on the son, who was entitled to a decree that the mortgage *quâ* mortgage should not affect his rights, but that the decree would not bar the mortgagee from enforcing any decree which he might obtain against the father for the amount of the loan against the ancestral property, including the property mortgaged.

Semble.—A money decree obtained against a father can be realised against both the father's and son's shares of any ancestral property which may be attached, as the pious obligation of a son to pay his father's debts arises in such a case.

Charanji Singh v. Teln Mal (152, P. R., 1888), *Surja Prasad v. Gulab Chand* (I. L. R., XXVII Calc., 762), *Sami Ayyangar v. Ponnai Mal* (I. L. R., XXI Mad., 28), *Kishen Lal v. Garurndhwarja Prasad Singh* (I. L. R., XXI All., 238), *Badri Prasad v. Madan Lal* (I. L. R., XV All., 75), *Khalil-ul-Rahman v. Gobind Pershad* (I. L. R., XX Calc., 328), and *Ganga Prasad v. Ajudhia Pershad Singh*, (I. L. R., VIII Calc., 131), followed. *Amar Singh v. Aziz Din* (33, P. R., 1892), and *Jaggan Nath v. Tulsi Das* (72, P. R., 1898), referred to. **BAHADUR SINGH v. DESRAJ AND PERMANAND**

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I.

INJUNCTION.

1. *When to be granted—Discretion of Court—Damages.*

See *Common Land*, No. 3.

2. *Obstruction to private right of way.*

See *Easement*.

3. *Jajman and Acharaj—Realization of virt from Jajmans.*—In a suit for a permanent injunction to restrain defendant from receiving *virt* from the *Jajmans* on the ground that except the family of plaintiff no one within a certain area had any right to recover the same.

Held, that the property in *virt* being of uncertain and indefinite character depending on the good will of the *Jajman*, the latter being

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at liberty to prefer another *Acharaj*, injunction to restrain other persons from acting as *Acharaj* would amount to trenching unduly on the rights of the *Jajma*s to employ whatever priest they chose.

Ram Rattan v. Gori (38, P. R., 1872), *Gobind v. Sadda* (7, P. R., 1877), *Mathra v. Kanhya*, (119, P. R., 1879) and *Raja and another v. Krishna Bhat* (I. L. R., III Bom.), referred to. *GUR SAHAI v. KARAM CHAND*... .. 8

4. The Specific Relief Act contains no prohibition against a conditional injunction being granted. *HARI SINGH v. THE MUNICIPAL COMMITTEE OF PINDIGHEB* 78

INSOLVENCY.

Appeal from insolvency order.

See *Appeal, Civil*, No. 2.

INTEREST.

1. *Interest—Implied agreement to pay interest—No objection to notice on contract—Promise to pay.—Held*, that the fact that a customer signed order forms and received bills headed with the printed words "Terms one month's credit, interest at 12 per cent. charged on expiry," was not sufficient evidence of a promise to pay interest. *EDULJI AND CO. v. McDONALD* 55

2. *Contract Act, 1872, Sections 16, 74—Undue influence—Penalty—Unconscionable bargain—Interest.—Held*, that the mere fact that the rate of interest was high is insufficient to raise a presumption of undue influence such as is contemplated in Section 16 of the Contract Act. When under the terms of a bond the interest chargeable cannot be regarded as a penalty the terms of the bond must be enforced. Indian Courts cannot interfere at discretion merely on the ground that a bargain is hard and unconscionable. *BULAKI MAL v. ACRES* 96

3. *Interest—Absence of express agreement to pay interest—Implied agreement—Suit for balance due at dissolution of partnership and the adjustment of partnership account—Acts XXXII of 1839 and XXVIII of 1855.—In a case for the recovery of the amount due on account of balance struck by the defendants, where no express or implied agreement to pay interest was proved, and in the absence of evidence that by usage interest was chargeable and where the requirements of Act XXXII of 1839 had not been satisfied, held*, that interest should not be awarded as damages.

Kalmammal v. Peeru Meera Lerai Routhen (I. L. R., XX Mad., 481), cited. *Sheo Chand v. Chumna* (73, P. R., 1892) and *Rukun Din v. Rikhi Kesh* (36, P. R., 1894), distinguished. *BURA AND ANOTHER v. MAILIA SHAH* 104

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No.

INTEREST—concl'd.

4. *Mortgage—Interest—Post diem interest—Absence of covenant to pay interest after a certain date when the mortgage if not redeemed was to become a usufructuary one—Damages—Construction of document.*—On 16th June 1886, certain land was mortgaged to the plaintiff on the condition that the mortgagors will redeem in one year paying the principal debt and interest, and in case of default the mortgagee will be competent to take possession of the land in lieu of the principal sum and interest. The mortgagors having failed to pay the amount due under the mortgage the plaintiff filed a suit in 1898 for possession of the land in lieu of principal and interest up to that date.

Held, that as the mortgage was to be a simple one for the period of one year and if not redeemed by that time was to be converted into a usufructuary one with possession, and that as there was no express indication in the deed that after the expiration of the year the mortgagee was to be at liberty to wait as long as he pleased before taking possession, the plaintiff was not entitled to any interest after due date.

Ghasita Mal v. Ishar Das (8, P. R., 1890), *Sheo Chand v. Ohunna* (73, P. R., 1892), and *Mathura Das v. Raja Narindar Bahadur* (I. L. R., XIX All., 39), referred to. MOHAN LAL v. MUKIN AND OTHERS ...

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J.

JAGIR.

Jagir—Succession—Grant of Government revenue for life to parties, family in specific shares—Death of one sharer—Suit by the surviving sharer against the son of the deceased for certain instalments wrongfully enjoyed by the latter—Limitation Act, 1877, Schedule II, Article 131—Construction of such grant—Pensions Act, 1871, Section 6.—A jagir was granted to the family of the parties for life without any express provisions for survivorship. The jagir was to be divided into ten shares in three separate groups, the defendant's father and the plaintiff being two out of five sharers in group No. 2. The former died in 1868 and his share was peaceably enjoyed by his son until 1898, when the plaintiff filed a suit against the defendant on the allegation that two annual instalments proportionate to the defendant's share had been wrongfully enjoyed by the defendant, who pleaded limitation, and argued that in his presence the plaintiff was not an heir to his father.

Held, that as no demand was made prior to those which immediately preceded this suit, the suit was within limitation under Article 131 of the second Schedule of the Limitation Act.

Held, also, that the words *ta hin hayat* (for life) applied to each group collectively, and not to the members of the group individually, the effect being that the members of each group were entitled to take by survivorship on the death of any member of that group.

Gahna v. Ikhlis (154, P. R., 1889), cited. MUSSAMMAT ZINAT v. MURTAZA KHAN ...

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JAJMAN AND ACHARAJ.

Realization of virt from Jajman.

See *Injunction*, No. 3.

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No.

JOINDER OF PARTIES.

See Parties.

JOINT HINDU FAMILY.

See Hindu Law—Joint family.

JOINT STOCK COMPANY.

See Public Company.

JOINT WRONG-DOERS.

See Contribution—Suit for.

JUDGMENT.

Judgment of Small Cause Court—Contents of.

See Civil Procedure Code, Section 203.

JURISDICTION.

1. *Jurisdiction of Court to execute decree in excess of the limits of its pecuniary jurisdiction as an original Court.*

See Civil Procedure Code, 1882, Section 6.

2. *Jurisdiction of Civil Court to adjudicate on the correctness of boundaries laid down by the Settlement authorities.*

See Civil Procedure Code, 1882, Section 16 A.

3. *Suit for possession of land—Uncertainty as to the Court's jurisdiction.*

See Civil Procedure Code, 1882, Section 16 A.

4. *Jurisdiction of District Judge to re-open ex-parte decree which was appealed against to the Chief Court by the plaintiff.*

See Civil Procedure Code, 1882, Section 108.

5. *Jurisdiction—Suit for possession of land—Value of subject-matter—Court Fees Act, 1870, Section 7, clause 10.*

See Contract Act, Section 23.

6. *Jurisdiction—Suit for pre-emption—Value of suit—Course of appeal.*

See Punjab Courts Act, 1884, Section 39.

7. *Jurisdiction—Partition proceedings by the Revenue authorities—Jurisdiction of Civil Courts to entertain subsequent suit for a declaration that certain land was the plaintiff's exclusive property—Punjab Land Revenue Act, 1887, clause (1) and (2), XVII of Section 158.—Held, that a suit for a declaration of right inconsistent with the allotment of land made by a Revenue Officer can be brought in a Civil Court after*

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a partition has been formally completed, provided that the suit involves a question of title in any of the property affected by the partition proceedings and that Chapter IX of the Land Revenue Act does not bar the jurisdiction of the Civil Court where the point of joint ownership is disputed.

Ahmad Gul v. Bostan (118, P. R., 1894), referred to, and *Bochan Singh v. Mudhan Singh* (61, P. R., 1897), followed. *SARWAR v. SADULLA*

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8. *Jurisdiction—Suit for declaration—Value of subject-matter—Suits Valuation Act, 1887, Section 11.* Held, that a suit for a declaration that certain land was *shamilat deh* and liable to partition can only be adjudicated upon by a court of competent powers with reference to the value of the entire estate, and that Section 11 of the Suits Valuation Act is not applicable where the valuation has been fixed by rules having the force of law. The value of the land in dispute at thirty times the *jama* being Rs. 7,212-14-6, the first Court, a Subordinate Judge of the 2nd class, was not competent to try the suit. A question of jurisdiction has to be noticed and decided if it is patent on the record although the ground was not urged in the lower Appellate Court nor raised in the memorandum of appeal in this Court.

Gunga S'hai v. Sheo Lal (132, P. R., 1894), followed; *Ballah Mal v. Bhupa Mal* (110, P. R., 1888), distinguished; *Dinesh Chander Roy Chaudhury v. Sarnomoy Debi* (1 Cal., W. N., 136), *Gunamani Dasi v. Mahabharat Ghosh* (1 Cal., W. N., XXIII), *Krishnasami v. Kanakasabai* (I. L. R., XIV Mad., 183) and *Muthusami Mudaliar v. Nallakulantha Mudaliar* (I. L. R., XVIII Mad., 419), referred to, *KHUDAYAR v. WAHAB DIN*

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Jurisdiction—Valuation of suit—Suits Valuation Act, 1887, Section 8—Suit for the cancellation of an auction sale of a house sold in execution of a money decree not exceeding Rs. 100—Punjab Courts Act, 1884, Section 3.—The value, for purposes of jurisdiction, of a suit for the cancellation of an auction sale of a house sold in execution of a money decree is the value of the judgment-debtor's interest in the house in suit assessed by the auction sale, and not the value the plaintiff chose to assess it at.

Sheo Deri Ram v. Tulsi Ram (I. L. R., XV All., 378), *Bhai Harnam Singh v. Mussammatt Bhagwan Devi* (50, P. R., 1890), *Harnam Singh v. Kirpa Ram* (1, P. R., 1887, F. B.), *Modhusudan Koer v. Rakhal Chunder Roy* (I. L. R., XV Cal., 104) and *Sohan Lal v. Gulab Mal and others* (50, P. R., 1896), followed. *RADHA RAM v. HIRA AND OTHERS*

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10. *Marriage—Suit for a declaration that defendant is not the lawful wife of the plaintiff—Jurisdiction of Civil Courts to entertain such a suit when an order for maintenance passed under Section 488 of the Criminal Procedure Code is in force against the plaintiff.*—Held, that a Civil Court has jurisdiction to decide whether the defendant was or was not the

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lawful wife of the plaintiff at the time the suit was instituted. An order for maintenance passed by Magistrate in favour of the defendant is no bar to such suit. *WARYAM SINGH v. MUSSANMAT PREMON* ...

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JURISDICTION OF CIVIL OR REVENUE COURT.

*Grant of a portion of the village common land to a person holding the office of ala-lambardar rent free—Suit for dispossession—Landlord and tenant—Punjab Tenancy Act, 1887, Section 4, clause 5—*Defendant having been appointed ala-lambardar by virtue of his office obtained a grant from Government with the consent of the village proprietary body of a portion of the village common land as *muafi*. The *muafi* was resumed in 1892, and plaintiffs, the recorded proprietors of the land, sued for possession on the allegation that they were the landlords, and that the land had been held by defendant as ala-lambardar's *muafi*, and that on the resumption of the *muafi* the defendant was not entitled to retain possession. The question referred was whether the suit was one cognizable by the Civil or Revenue Court.

Held, by the Full Bench, that the suit was excluded from the cognizance of the Civil Court as the arrangement made with the consent of the proprietary body was a transfer to the ala-lambardar of a rent free cultivating right for a fixed term, and that the ala-lambardar held under the proprietary body, and was their tenant.

Sham Singh and others v. Ghula Singh and others (105, P. R., 1894), and *Sohna v. Mosam* (23, P. R., 1895), overruled. *Jhanda Singh v. Dhana Singh* (1, P. R., 1896, Rev.), and *Lohna Singh and others v. Hira Singh* (1, P. R., 1897, Rev.), cited and approved.—*HIRA SINGH AND OTHERS v. GURMUKH SINGH* ...

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K.

KHANADAMAD.

See *Custom—Inheritance*, No. 9.

L.

LAND REVENUE ACT.

See *Punjab Land Revenue Act*.

LANDLORD AND TENANT.

1. *Tenant's possession adverse to the landlord.*

See *Adverse Possession*, No. 4.

2. *Grant of a portion of the village common land to a person holding the office of ala-lambardar rent free—Suit for dispossession by the proprietors of the land—Landlord and tenant—Punjab Tenancy Act, 1887, Section 4, clause 5.*

See *Jurisdiction of Civil or Revenue Court*.

LAWS ACT.

See *Punjab Laws Act*, 1872.

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No.

LIMITATION.

1. *Suit by reversioner—Adverse possession—Successive female heirs—Possession adverse to the female adverse to the reversioners.*

See *Abandonment of land*, No. 2.

2. *For a suit by a reversioner for possession of immoveable property in possession of defendant under an alleged adoption.*

See *Limitation Act*, 1877, *Schedule II*, *Article 118*.

3. *Limitation—Change in the law of limitation—Effect of new law on claims barred under the old law—Limitation Act, 1877, Schedule II, Article 120—Punjab Limitation Act, 1900.*—In a suit filed in 1900 by a reversioner of a sonless proprietor to have an alienation of ancestral land made in 1889 by such sonless proprietor declared void, the first Court found the claim barred under Article 120, Schedule II of Act XV of 1877. The Divisional Judge, on appeal, held that the right to sue, though barred under Act XV of 1877 at the date of the institution of the suit, was revived by the operation of the Punjab Limitation Act (1 of 1900), which was in force at that date.—*Held*, that the right to sue barred under Act XV of 1877 before the Punjab Limitation Act (1 of 1900) came into force was not revived by that Act. *TEKA v. SOHNU*...

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LIMITATION ACT, 1877.

SECTION 4.

Suit against minor—Appointment of guardian ad litem—Suit when instituted.—*Held*, that a suit to recover money due on a bond in which two of the defendants were minors, and the application for the appointment of a guardian *ad litem* to the minor defendants was presented two days after the suit was filed, must be deemed to have been instituted against them when the plaint was filed, and not when the application for the appointment of the guardian *ad litem* was made, as the Code of Civil Procedure does not require that the application should be made with the plaint and form part of it.

In re *Moti Ram v. Rupa Chand* (XI Bom., H. C. R., 21), and *Khem Karan v. Har Dayal* (I. L. R., IV All., 37), followed. *IMAMI v. SADDAN AND OTHERS* ...

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SECTION 19.

An acknowledgment of a mortgagor's title by a minor is inoperative and cannot give a new starting point for limitation for redemption. *ANIS-UL-REHMAN KHAN AND OTHERS v. BENI RAM AND OTHERS* ...

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SECTION 28.

Suit for recovery of possession of common waste land encroached upon by a trespasser—Limitation.

See *Common Land*, No. 4.

The references are to the Nos. given to the cases in the "Record."

No.

LIMITATION ACT, 1877—*contd.*

SCHEDULE II, Article 10

And Article 120—Mortgage by conditional sale—Foreclosure—Suit for pre-emption—Time from which period begins to run.—Held, by the Full Bench, that right of pre-emption accrues and limitation begins to run against a pre-emptor in the case of foreclosure of a mortgage by conditional sale from the date of the expiration of the year of grace allowed to mortgagor under Regulation XVII of 1806.

Sher Singh v. Imamulla (82, P. R., 1880), dissented from. *Harnam Das v. Kanwar Singh* (103, P. R., 1893), *Bur Singh v. Soheil Singh* (121, P. R., 1894), *Ali Abbas v. Kalka Parshad* (I. L. R., XIV All., 405) and *Batul Begam v. Munur Ali Khan* (I. L. R., XX All., 315, F. B.), approved. *Alu Prasad v. Sukhan* (I. L. R., III All., 610), distinguished. *Jeora Khun Singh v. Hookum Singh* (4, H. C. R., N. W. P., 358), *Forbes v. Ameroomissa* (5, W. R., 47, P. C.), *Ali Ganhar v. Jarakir* (30, P. R., 1892), and *Kundri v. Chuni Lal* (87, P. R., 1893), referred to. *ATAR SINGH v. RALIA RAM* 103

ARTICLE 74

And Article 75.—Limitation—Suit on instalment bond.—Held, that the limitation for a suit on an instalment bond is provided for by Article 74 of the second Schedule of the Limitation Act, 1877, unless it can be brought under Article 75, the essential requisites of which are that (1) the penalty should be attached to a single default, and (2) that the whole bond should then fall due, the absence of either of these conditions rendering that Article inapplicable. *SOBHA AND OTHERS v. RAM PARTAB AND ANOTHER* 74

ARTICLE 95.

Suit for rectification of a deed on the ground of fraud.—Held, that the limitation for a suit for rectification of a deed on the ground that the defendant induced the plaintiff to allow certain conditions to be entered in it by fraud, is provided for in Article 95 of the second Schedule of the Limitation Act.

The Advocate-General of Bombay v. Bai Punjabai (I. L. R., XVIII Bom., 551), distinguished. *GOPAL SHAH v. ARURA* 62

ARTICLE 118.

1. *Article 118 of the second Schedule of the Limitation Act of 1877 is not applicable to a suit to declare an adoption invalid, where the adoptor has no inherent power to adopt.* *MOHAMED DIN v. SADAR DIN* ... 67

2. *And Article 141—Suit by a reversioner for possession of immovable property—Defendant in possession under an alleged adoption.—A suit by a reversioner to recover possession of immovable property in the hands of a defendant under an alleged adoption, if not brought within the period prescribed in Article 118 of the Limitation Act, held barred.*

The references are to the Nos. given to the cases in the "Record."

No.

LIMITATION ACT, 1877—*contd.*

Shrinivas Murar v. Hanvant Chaudo Deshapande and others (I. L. R., XXIV Bom., 260), *Malkrajun Bin Shidramappa Pasare v. Narhari Bin Shirappa and another* (V. Calc., W. N., 10), and *Jagadamba Chaudhrani v. Dakhina Mohun Roy Chaudhri* (I. L. R., XIII Calc., 308), followed. GUJAR SINGH AND ANOTHER v. PURAN

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ARTICLE 118.

Suit to obtain a declaration that an alleged adoption was invalid or had never taken place—Limitation from which period begins to run.—On the 28th August 1884 one K. executed a deed of adoption in favor of his daughter's son. In 1894, after the death of K., his widow assented to mutation of names being effected in favor of the adopted son. In 1897 the plaintiffs, who are the male collaterals of K., instituted a suit to obtain a declaration that the alleged adoption was invalid and that it never took place. The first Court found that the plaintiffs' claim was barred by limitation, that the defendant was adopted by K., and that the adoption was not invalid. The Divisional Judge reversed the decree of the first Court on the grounds that the suit was not barred, that the fact of the widow of K. allowing mutation in favor of the adopted son gave plaintiff a fresh cause of action.

Held, that as the title of the adopted son to the property was created by the adoption, and not by any subsequent admission on the part of the widow of the adoptive father that the title existed, such an admission did not give plaintiff any fresh cause of action, and as the plaintiffs had knowledge of the adoption more than six years previous to the institution of the suit, their claim was barred under Article 118 of the second Schedule to the Limitation Act of 1877. HEM RAJ AND ANOTHER v. SAHIBA AND OTHERS

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ARTICLE 120.

See *Limitation No. 3.*

ARTICLE 131.

Jagir—Succession—Grant of Government revenue for life to parties' family in specific shares—Death of one sharer—Suit by the surviving sharer against the son of the deceased for certain instalments wrongfully enjoyed by the latter—Limitation.—A jagir was granted to the family of the parties for life without any express provisions for survivorship. The jagir was to be divided into ten shares in three separate groups, the defendant's father and the plaintiff being two out of five sharers in group No. 2. The former died in 1868, and his share was peaceably enjoyed by his son until 1898, when the plaintiff filed a suit against the defendant on the allegation that two annual instalments proportionate to the defendant's shares had been wrongfully enjoyed by the defendant, who pleaded limitation, and argued that in his presence the plaintiff was not an heir to his father.

Held, that as no demand was made prior to those which immediately preceded this suit, the suit was within limitation under Article 131 of

The references are to the Nos. given to the cases in the "Record."

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the second Schedule of the Limitation Act. *Gahna v. Ikhlas* (151, P. R., 1889), cited. MUSSAMMAT ZINAT *v.* MURTAZA KHAN 108

ARTICLE 141

And Article 242—Abandonment of land—Extinguishment of proprietary rights—Limitation—Reversioners suit by—Adverse possession—Successive female heirs—Possession adverse to the females adverse to the reversioners.

See *Abandonment of land*, No. 2.

ARTICLE 142.

Adverse possession—Joint owners, landlord and tenant—Non-payment of rent—Burden of proof.

See *Adverse possession*, No. 4.

ARTICLE 144.

Adverse possession.—By mortgage entered into between the plaintiff's ancestors and defendant, Kaka, in 1879, it was agreed that the whole amount should be repaid by instalments, and in default of payment of any instalment, the possession of the mortgaged property was to be taken by the mortgagee. In 1885 the mortgagor sold a certain portion of the mortgaged property to defendants 1 and 2, and in 1886 the mortgagee sued the mortgagor for possession without making the first two defendants parties to that suit, and obtained a decree in 1886 for possession, but never got actual possession. Subsequent to the decree the mortgagor sold the remainder of the mortgaged property to the other defendants. In 1895 the mortgagee's heirs filed the present suit for possession of the land. *Held*, that as the period for plaintiff's claim as regards the first two defendants could only be reckoned from the date of the original default in payment of instalment under the mortgage-deed of 1879 which could not have been later than 1882, and they having been in possession at the time of the prior suit to which they were not made parties, and were therefore not bound by that decree, and as with respect to that portion of the land, the mortgagor had no right, title or interest left in it subsequent to their sale in 1895, the suit was barred by limitation. But as regards those defendants who acquired their title subsequent to the decree of 1886 against the mortgagor that decree stands against them and they can claim no title by adverse possession, the suit having been instituted within twelve years from their obtaining possession. KESAR SINGH AND OTHERS *v.* THAKAR DAS 10

ARTICLE 179.

Execution of decree—Application for execution not in accordance with law—Step in aid of execution—Limitation.—An application for execution of a decree not in accordance with the terms of the decree is not a step in aid of execution as contemplated by clause 4, Article 179 of the second Schedule of the Limitation Act, 1877. SRI RAM AND ANOTHER *v.* MAJID-UD-DIN AND OTHERS 98

The references are to the Nos. given to the cases in the "Record."

No,

M.

MALICIOUS PROSECUTION.

Suit for malicious prosecution—Reasonable and probable cause—Malice—Conviction of plaintiff by two Courts—Damages—Measure and assessment of damages.—Where the charge was brought by a defendant upon untrue facts which were entirely within his own knowledge, and the plaintiff was convicted by two Courts upon what was held by the Chief Court (while holding the plaintiff's action also to have been actuated solely by malice) to be a wrong view of the law as applied to the facts found.

Held, that the defendant had no reasonable and probable cause for the charge, which was malicious in the legal sense, and that the plaintiff's action having been also actuated solely by malice, the measure of damages awarded should be under such circumstances of the smallest possible dimensions.

Bhagwant Sing v. Pandit Joti Sarup (4, P. R., 1897), *Hira Chand Banerji v. Bonee Madhub Chatterji* (6, W. R., 29), *Ganga Parshad v. Ramphul Sahoo* (20, W. R., 177), and *Johnstone v. Sutton* (1, R. R., 269), cited. *Hall v. Venkata Krishna* (I. L. R., XIII Mad., 394), distinguished. *BADRI DAS v. NATHU MAL*

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MARRIAGE.

Suit for a declaration that the defendant is not the lawful wife of the plaintiff—Jurisdiction of Civil Court to entertain such a suit when an order for maintenance passed under Section 488 of the Criminal Procedure Code is in force against the plaintiff.

See *Jurisdiction*, No. 10.

MASTER AND SERVANT.

Master and servant—Monthly service—Consequence of leaving employment without giving sufficient notice—Right to wages.—Monthly servants are expected to give a month's notice of their intention to leave their service, therefore where a servant who was employed on a monthly engagement, and left after giving a written notice that he would leave in seven days, and would not work after the expiry of his notice, *held*, that the servant was not entitled to any pay for the portion of the month during which he left his service.

Ramji Manor v. Little (10, Bom. H. C. R., 57) and *Dhumea Behara v. Sevenoaks* (I. L. R., XIII Cal., 80), cited. *KENNELLY v. ABDUL HAQ*.

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MINOR.

Suit against minor—Appointment of guardian ad litem—Suit when instituted.

See *Limitation Act*, 1877, Section 4.

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No.

MORTGAGE.

1. *Mortgage or sale—Oral evidence to prove that an apparent sale was a mortgage—Admissibility of parol evidence to vary a written contract.*

See Evidence Act, 1872, Section 92.

2. *Hindu Law—Mitakshara—Alienation of ancestral property—Suit by son against his father and a mortgagee for declaration that the mortgage entered into by his father should not affect his rights—Present payment—Legal necessity—Liability of son for father's debts.*

See Hindu Law—Joint family.

3. *Mortgage—Interest—Post diem interest—Absence of covenant to pay interest after a certain date when the mortgage if not redeemed was to become a usufructary one—Damages—Construction of document.*

See Interest, No. 4.

4. *Acknowledgment of a mortgagor's title by a minor.*

See Limitation Act, 1877, Section 19.

5. *Mortgage by conditional sale—Foreclosure—Suit for pre-emption—Limitation—Time from which period begins to run.*

See Limitation Act, 1877, Schedule II, Article 10.

6. *Suit for pre-emption based on mortgage.*

See Pre-emption, No. 3.

7. *Mortgage—Conditional sale—Foreclosure—Regulation XVII of 1806—Strict compliance with conditions—Demand for payment of the specific amount—Mistake in the heading of the notice—Official designation not in the handwriting of the Judge—Wrong description of the property mortgaged.*—In a suit for possession after foreclosure of a mortgage by conditional sale under Regulation XVII of 1806, it was contended by the mortgagor (i) that no demand for payment of the specific amount due under the mortgage previous to the issue of the notice had been proved; (ii) that the notice issued was defective and invalid, inasmuch as the heading was wrong and incorrectly described the Regulation under which it was issued; (iii) that the official designation of the officer was not in his own handwriting; (iv) that the property mortgaged was wrongly described; and (v) that a copy of application and the notice were not duly served upon him.

Held, that under Section 8 of the Regulation a demand for payment is a condition precedent to the validity of the notice to be thereafter issued, and that an omission to make it would vitiate the foreclosure proceedings, but it was not essential that the exact amount due should be distinctly specified in it; and that there was sufficient evidence to prove that a demand had been made before the notice was issued and that copies of application and notice had been duly served.

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No.

MORTGAGE—*contd.*

That the heading of the notice, *i. e.*, notice *ba illat dafa* 8, Regulation *Sutarah*, 1880, though undoubtedly wrong as it incorrectly described the Regulation under which it was issued was immaterial and surplusage as the section make no provision for a heading in any particular form.

That a notice signed in his own name by the Judge was not defective merely because the official designation was impressed with a rubber stamp, and

That as the Regulation does not require any specified description of the property to be entered in the notice the mistake was innocuous.

Wasawa Singh v. Rura (24, *P. R.*, 1895), followed; *Ram Chand v. Ghulam Muhammad* (84, *P. R.*, 1890), explained; *Karan Singh v. Mohan Lal* (*I. L. R.*, *V. All.*, 9). *Forbes v. Amir-un-Nissa* (5, *W. R.*, *P. O.*, 47) and *Sham Singh v. Karm* (185, *P. R.*, 1889), referred to.

WALI MUHAMMAD v. RAMJI LAL

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8. *Mortgage—Mortgage for valuable consideration—Intent to defeat and delay a particular creditor—Fraud.*—On the 17th June 1897 plaintiff sued the sons of L. M. for an unsecured debt, and on the same day applied for and obtained an order for attachment of property prior to judgment. On 18th the order on the defendant's objection was withdrawn, but a fresh one was again granted on the 19th. On 17th the defendants executed a mortgage deed of all their property, moveable and immoveable, including outstanding debts in favour of the appellant. The plaintiff on getting his decree in the first Court immediately attached certain houses which were sold by auction, the appellant objected as mortgage, and the houses were ordered to be sold subject to his mortgage.

The plaintiff then brought the present suit to set aside the above order, on the ground that the mortgage was fraudulent and made in order to defeat his claim, and was also subsequent to the issue of the prohibitory order.

The Courts below decreed the claim, holding that the mortgage was not *bonâ fide* and was effected with full knowledge of the plaintiff's suit and the issue of the prohibitory order, and was practically intended to deprive him of his right to realize his debt from L. M.'s estate, and although a good deal of the consideration-money was devoted to paying off other creditors of the deceased it was void.

On further appeal to the Chief Court,

Held, that though the appellant intended to pay the consideration entered in the deed in full, and it was to be paid to creditors and not to the debtors, yet as he entered in his deed property over which he did not really mean to claim a lien, and which he allowed to remain in the mortgagors' hands for their benefit, and joined with the mortgagors in getting the deed executed in order to defeat and delay the

The references are to the Nos. given to the cases in the "Record."

No.

MORTGAGE—*contd.*

plaintiff's realization of his debt, upon the authorities and under the rule of equity and good conscience it was void against the plaintiff.

Twyne's Case (1, *Smith's Leading Cases*, 9th Edition, 1), *Cadogan v. Kennett* (Cowp. 434), *Worsley v. DeMattos* (1 Burr., 474), *Holmes v. Penney* (26, L. J., Ch. 179.), *Harman v. Richards* (22, L. J., Ch. 1066), *Bott v. Smith* (21, Beav., 511), followed; *Abdul Hie v. Mir Muhammad Mozaffar Husain* (I. L. R., X Calc., 616), *Copis v. Middleton* (2, Mudd., 410), *Golden v. Gillam* (L. R. 20, Ch. Dn., 389), *Joshua v. The Alliance Bank of Simla* (I. L. R., XXII Calc., 185), *Mussammot Chand Kaur v. Mussammot Fajjo* (113, P. R., 1880), referred to; *Wood v. Dieie* (7, Q. B., 892), *Darvill v. Terry* (30, L. J. Ex., 355), *Rangilbhai Kalyandas v. Vinayak Vishnu* (I. L. R., XIII Bom., 666), *Moti Lal Ravichand v. Utam Jaggirandas* (I. L. R., XIII Bom., 431), *Nona v. Routmal* (I. L. R., XXII Bom., 255) *Ishan Chander Das Sirkar v. Bishen Sirdar* (I. L. R., XXIV Calc., 825), *Narayana Patter v. Viraraghawan Patter* (I. L. R., XXIII Mad., 184), *Lakha Mal v. Mula* (21, P. R., 1875), *Ram Buran Singh v. Jankee Sahoo* (22, W. R., 173) and *Seth Kastur Chand v. Mangal Sen* (68, P. R., 1895), distinguished.

LAKHMI NARAIN *v.* TARA SINGH 6

9. *Mortgage—Conditional sale—Foreclosure—Regulation XVII of 1806—Defects in notice issued under Section 8—Preseeration of right of redemption on deposit of principal and interest within the year of grace—Regulation I of 1798, Section 2.*—In a suit for possession of a house by redemption filed by the plaintiff a few days before the expiry of the year of grace, who had after the service of a notice of foreclosure admitted only Rs. 45 to be due and had deposited Rs. 63 as the amount of the balance of principal and interest due in the Court which had issued the notice, alleging that his father had paid an item of Rs. 395 out of the mortgage money, which payment he was unable to prove, *held*, that in a notice under Section 8 of Regulation XVII of 1806, where the mortgagor was specially referred to Section 7 of Regulation, which lays down the steps which must be taken in order to redeem the property within the year of grace, the mere omission to specify the exact or uncertain amount of interest due or even to mention the interest at all or the fact that the words "District Judge" on the notice was impressed and not written, were not defects sufficient to vitiate the foreclosure proceedings. *Held, further*, that the plaintiff was not entitled to a decree for redemption on any terms, his right to redeem having expired at the end of the year of grace, as he had not complied with the requirements of Section 2 of Regulation I of 1798, he not having deposited even the total amount of the principal due, nor taken either of the alternative courses open to him under Section 7 of Regulation XVII of 1806 within the year of grace.

Mehro v. Suja (84, P. R., 1882), *Fatteh v. Sain Ditta* (76, P. R., 1877), referred to. *Forbes v. Ameeroonissa Begum* (5, W. R., P. O., 47), followed, and *Wasawa Singh v. Pura* (24, P. R., 1895), approved.

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The references are to the Nos. given to the cases in the "Record."

No.

MORTGAGE—*concl'd.*

10. *Mortgage—Conditional sale—Foreclosure—Regulation XVIII of 1806—Validity of notice of foreclosure of mortgage.—Held*, that it is not essential to the validity of a notice under Section 8 of Regulation XVII of 1806 that the actual wording of the Regulation should be reproduced in it *verbatim*. MUSSAMMAT SARDARI v. CHIRINJI LAL ... 28

11. *Mortgage—Conditional sale—Foreclosure—Regulation XVII of 1806—Validity of notice of foreclosure of mortgage.—Held*, that in a case where the foreclosure proceedings are otherwise correct and regular, mere clerical slips or misprints in a notice under Section 8 of Regulation XVII of 1806, such as "Act" and "Resolution" or "Zarlution" for "Regulation" when the rest of it was properly worded in all particulars, cannot be held to render it void. JIWAN RAM v. AMIR BEG ... 38

12. *Mortgage—Mortgage of niawadari rights—Redemption of—Phycial possession.—Held*, that according to the custom of the Gandapur tract of the Dera Ismail Khan District a *niawadari* mortgagee may acquire rights in the land held by him as mortgagee, independently of and over and above his rights as mortgagee; and that such rights would not necessarily be extinguished by the redemption of the *niawadari* mortgage. Moosa Khan v. Muhammad Naurang Khan (24, P. R., 1871), followed. MUHAMMAD HASSAN KHAN v. MUHAMMAD GUL KHAN ... 40

13. *Mortgage by conditional sale—Suit for foreclosure—Validity of notice for foreclosure—Regulation XVII of 1806, Section 8.—Held*, that although a notice served on a mortgagor under Section 8 of Regulation XVII of 1806 need not contain any specification of the property in respect of which foreclosure is sought, the words "the property mortgaged" being a sufficient description, when the property mortgaged consisted of 4 *ghumaos* 3 *kanals* 19 *marlas* together with *shamilat* land in proportion to that area, which extended to nearly 12 *ghumaos*, and the notice which had been served on the mortgagor only described the property as the area above-mentioned, and made no specific mention of the *shamilat*, the notice was defective, inasmuch as it must have led the mortgagors to think that they were in danger of only losing 4 *ghumaos* and not 16 *ghumaos* by non-compliance with its terms.

Bura v. Jhanda (113, P. R., 1900), and *Wali Muhammad v. Ramji Lal* (5, P. R., 1901), distinguished, *Baju Shah v. Hukmal* (42, P. R., 1897), *Fakira v. Piyara Lal* (24, P. R., 1901), and *Jiwan Ram v. Amir Beg* (38, P. R., 1901), referred to. WAZIR CHAND v. MAKHAN AND OTHERS ... 109

MUHAMMADAN LAW.

Inheritance.

See *Custom—Inheritance.*

MUNICIPAL ACT.

See *Punjab Municipal Act, 1891.*

The references are to the Nos. given to the cases in the "Record."

No.

MUNICIPAL COMMITTEE.

1. *Sanction to build—Punjab Municipal Act, 1891, Sections 92 and 95—Conditional sanction.—Held*, that the Municipal Committee, while acknowledging that there was no objection to the erection of a building, was not empowered to compel the applicant to do something quite foreign to the object of the application and to the purpose and object for which the power of sanction was given. *DAMODAR DAS v. MUNICIPAL COMMITTEE, DELHI* 27

MUNICIPAL REGISTER OF DEATHS.

In a case where the question of age of a person at a certain time was disputed, the Municipal Register of Deaths was held relevant under Section 35 of the Evidence Act, and being public document within the meaning of clause (iii) (1) of Section 74 of that Act, and produced from proper custody, presumed to be genuine. *ANIS-UL-REHMAN KHAN AND OTHERS v. BENI RAM AND OTHERS* 59

N.

NIAWADARI RIGHTS.

Mortgage of—Redemption—Physical possession.

See *Mortgage*, No. 12.

NON-AGRICULTURISTS.

Inheritance—Presumption in favour of the existence of a custom under Section 5 (a) of the Punjab Laws Act, 1872.

See *Custom—Inheritance*, No. 2.

NON-JOINDER OF PARTIES.

See *Parties*.

NON-PROPRIETOR.

Erection of a kotha on gora-deh by non-proprietory resident with the permission of a proprietor in possession—Absence of special damage.

See *Common Land*, No. 2.

NUISANCE.

Nuisance—Municipal Committee's power to carry water into a public drain—Municipal Act, 1890, Section 128—Injunction—Conditional injunction—Specific Relief Act, 1877, Section 56 (g).

The Municipal Committee of Pindigheb had diverted the flow of the waste water of a *dharmshala* by conveying it through a new masonry drain which emptied itself into a *katcha* drain in the public street, on which two suits were filed against the Municipal Committee, one by the owners of the houses whose houses abut in the public street, for a perpetual injunction restraining the Municipal Committee

The references are to the Nos. given to the cases in the "Record."

No.

NUISANCE—*conclld.*

from discharging the water of the *dharmasala* through the drain in the street, and the other by the person in charge of the *dharmasala* for a similar injunction to restrain the defendants from interfering with the discharge of water through certain properties and diverting its flow to the drain in the street above mentioned. The Court of first instance, whilst holding that the Municipal Committee was within its rights in constructing the new drain, found that if the old drain remained *katcha* the increased quantity of water discharged into it might during the rainy season cause some damage to the plaintiffs' houses, granted the injunction until the Municipal Committee converted the *katcha* drain into a *pacca* masonry one, but dismissed the second suit on the ground that the plaintiff has no status to maintain it, which orders were confirmed by the Divisional Judge. The plaintiffs in both cases appealed to the Chief Court, on the grounds, amongst others, that the Committee had no power to alter the direction of the flow of water from private drains, or the direction of the drains, and that no conditional injunction should have been granted.

Held, that the plaintiffs in the first case had no right whatever in preventing the Committee from allowing the water to flow into their drain, and could only object if their rights are interfered with by the diversion, and only to that extent.

The Specific Relief Act contains no prohibition against a conditional injunction being granted, but that the form adopted was not correct, as it amounted to a temporary injunction of indefinite duration and not a perpetual one, the proper order would be to grant a perpetual injunction conditional upon defendant not removing the cause of prospective damage to the satisfaction of the Court within a fixed period.

Held, also that public bodies, like Municipal Committees, should act in accordance with the procedure provided by the Statute governing their acts, but where with the tacit consent and acquiescence of the persons interested in a property they have acquired a footing with respect to the discharge of its waste water, and do an act which has caused no damage, but improved its conditions, interference by a Court of Justice would not be equitable.

Akilandammal and another v. Venkatchola Mudalai (VI, Mad., H. O. R., 112), *Attorney-General v. The Corporation of Halifax* (39, L. J. Ch., 129), and *Attorney-General v. Birmingham Drainage Board* (L. R., 17 Ch. Dn., 685), followed. *HARI SINGH AND OTHERS v. THE MUNICIPAL COMMITTEE OF PINDIGHEB*

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O.

OCCUPANCY RIGHTS.

1. *Alienation of right of reversioner to restrain such alienation—Burden of proof—*

See Custom—Alienation, No. 14.

The references are to the Nos. given to the cases in the "Record."

No.

OCCUPANCY RIGHTS—*concl'd.*

2. *Transfer of right of occupancy under Section 5 (1) (c)—Measure of fixing value by the Revenue Officer.*

See Punjab Tenancy Act, Section 53.

P.

PAGVAND AND CHUNDAVAND.

See Custom—Inheritance, No. 12.

PARTIES.

1. *Joinder of respondents on appeal.*

See Civil Procedure Code, 1882, Section 559.

2. *Non-appearance of, on the day fixed for delivery of judgment.*

See Dismissal of suit.

3. *Parties—Adding parties as plaintiffs—Joint promise to plaintiff and others—Right of plaintiff to sue alone—Cause of action—Non-joinder—Procedure—Civil Procedure Code, 1882, Section 54 (c).—Held, that, on objection taken by the defendant on the ground of non-joinder of a party as plaintiff, at the first hearing, the plaint may be rejected under Section 54 (c) without being returned for amendment, if the plaintiff insists on adhering to the allegation that the contract sued on was entered into with him alone; and that the Appellate Court may dismiss his appeal against the order of rejection without giving him an opportunity, to amend his plaint by adding the party who should originally have been added.*

Ramsebuk v. Ram Lal Koondoo (I. L. R., VI Cal., 815) and Badri Das v. Jawala Pershad (86, P. R., 1891, F. B.), followed; Kale Khan v. Sewa Ram (156, P. R., 1883, F. B.), referred. POHLU SHAH v. DITTA SINGH 56

4. *Suit by some of the several co-sharers against the trespasser affecting common land—Effect of non-joinder of other co-sharers—Civil Procedure Code, 1882, Section 30—Decree, form of.—Held, that one or several of many co-sharers can sue to prevent invasion of their common property by a mere trespasser, and that in such a case a decree for sole possession or for possession on behalf of other co-sharers should not generally be given, the proper form of decree should be for the restoration of the property to its condition prior to the trespasser's invasion, and so preserve the invaded rights which the plaintiff and other co-sharers possessed in the property. RANZAN ALI v. BASHARAT ALI AND OTHERS.* 105

PARTNERSHIP.

1. *Suit for balance due at dissolution of partnership and the adjustment of partnership account—Absence of express agreement to pay interest—Implied agreement.*

See Interest, No. 3.

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No.

PARTNERSHIP—*concl'd.*

2. *Partnership*—*Suit by partner against co-partner who was also manager of the business to have an account rendered of his stewardship*—*Accounts without dissolution*—*Contract Act, 1872, Sections 213, 258.*—*Held*, that, although there is a sound general principle that one partner should not be allowed to sue a co-partner for an account without at the same time claiming a final settlement of all questions between them, and a dissolution of partnership, yet in exceptional cases where equity requires such a course the general principle should be relaxed, and one partner may be allowed to file a suit against his co-partner for account without praying for dissolution of the partnership.

Phula and Dana v. Shib Dial (34, P. R., 1873), *Narain Das v. Bholi* (71, P. R., 1881), and *Kassa-Mal v. Gopi* (I. L. R., IX All., 120), referred to. *Wallworth v. Holt* (48, R. R., 187), *Richards v. Davies* (34, R. R., 111), and *Hichens v. Congreve* (32, R. R., 173), cited. *AZIM KHAN v. MUHAMMAD RIAZ-UD-DIN AND OTHERS.*

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PENSIONS ACT, 1871.

SECTION 6.

Jagir—Succession—Grant of Government revenue for life to parties' family in specific shares—Death of one sharer—Suit by the surviving sharer against the son of the deceased for certain instalments wrongfully enjoyed by the latter—Limitation—Limitation Act, 1877, Schedule II, Article 131—Construction of such grant.

1179 J

See *Jagir*

PLAINT.

Alternative reliefs—Inconsistent claims.—The plaintiffs sued to recover possession of a piece of land situate in front of their houses and shops, alleging that it had been jointly enjoyed by them, and that the defendants Nos. 1 and 2 having obtained a fictitious deed of sale of a portion thereof from defendant No. 5 had taken possession and commenced to build thereon, the relief sought being either a decree for possession of the land, or an injunction restraining the defendants Nos. 1 and 2 from building thereon. *Held*, that the claims were not inconsistent, the difference being between sole right and joint right, and that the plaintiffs were at liberty to claim in the alternative exclusive possession, or an injunction to restrain the defendants from interfering with their rights as co-sharers in the land in suit. *GUJAR MAL AND OTHERS v. RAM RICHPAL AND OTHERS*

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POSSESSION.

Suit by a reversioner for possession of immovable property in possession of defendant under an alleged adoption.

See *Limitation Act, 1877, Schedule II, Article 118.*

The references are to the Nos. given to the cases in the "Record."

No. 1

PRE-EMPTION.

1. *Mortgage by conditional sale—Foreclosure—Suit for pre-emption—Limitation—Time from which period begins to run.*

See *Limitation Act, 1877, Schedule II, Article 10.*

2. *Suit for pre-emption—Jurisdiction—Valuation of suit—Courts of Appeal.*

See *Punjab Courts Act, 1884, Section 39.*

3. *Custom—Pre-emption—Mortgage—Suit for pre-emption based on mortgage—Wajib-ul-arz—Mauza Shari, tahsil Hoshiarpur.*—In a suit for possession as pre-emptors of certain mortgage land, situate in mauza Sahri in the Hoshiarpur tahsil of the Hoshiarpur district, based upon a provision in the *Wajib-ul-arz* of the last settlement. *Held*, that the plaintiffs had failed to prove that the provision in the former *Wajib-ul-arz* had ever been acted upon, and that the true meaning of the existing *Wajib-ul-arz* was that the right of pre-emption arises, in cases of mortgages, only on foreclosure of the right of redemption.

Baland Khan and another v. Thakar Das and another (10, P. R., 1887), and *Masta v. Pohlo and others* (52, P. R., 1896), referred to. BHAGWAN SINGH AND ANOTHER v. HUKAM SINGH AND ANOTHER 11

4. *Custom—Pre-emption—Presumption as to existence of custom of pre-emption—Rebuttal of—Punjab Laws Act, 1872, Section 10.*—*Held*, that to establish a custom opposed to that which must, under Section 10 of the Punjab Laws Act, be presumed to exist, it was not sufficient to prove that, notwithstanding several sales of land in the village, no suit for pre-emption was ever filed, or that the present Settlement record was silent on the subject.

Sammand Khan v. Mahtaba (48, P. R., 1883), followed. MAHMUD KHAN v. RAM DAS AND OTHERS 16

5. *Pre-emption—Notice to pre-emptors under Section 53 of the Tenancy Act, 1887—Waiver of right—Suit by pre-emptor as an occupancy tenant—Punjab Laws Act, 1872, Section 13.*—*Held*, in a suit for pre-emption of an occupancy holding that a landlord who was also an occupancy tenant in the same village served with a notice under Section 53 of the Tenancy Act was at liberty to elect to claim pre-emption under either of his qualifications, and that his failure to proceed under the Tenancy Act did not bar him from resorting to the Civil Court, or constitute acquiescence or a waiver of his right. *Held, also*, that the absence of specification of price demanded in a notice under Section 53 prevents it being effectual under Section 13 of the Punjab Laws Act. SARDAR ALI SHAH AND OTHERS v. JIWAN SINGH 22

6. *Pre-emption—Sale for a certain specific purpose on certain specific terms—Pre-emptors how far bound by the terms in the deed.*—Where the *bonâ fide* intention of a vendor and vendee was that certain land should be sold and bought for the purpose of the erection of a *dharamsala*, and that the sale should be cancelled on failure to fulfil this condition,

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No.

PRE-EMPTION—*contd.*

and the plaintiff as a pre-emptor claimed to purchase without fulfilling the condition, alleging that it was not intended to be enforced and that he was not bound by the terms in the deed; *held*, that as there was nothing unusual or illegal in the arrangement and the conditions were *bonâ fide*, the pre-emptor must abide by the terms of the deed which had been offered and accepted by the vendee whom he wished to oust.
BALDEO DAS *v.* PIARE LAL 24

7. *Pre-emption—Claim based on vicinage where the pre-emptor parted with his own property during the pendency of the suit.*—Where a pre-emptor filed a suit for pre-emption of a dwelling-house on the ground of vicinage, but before obtaining a decree divested himself by gift of the proprietary right in the house, the title in which gave him the right to sue. *Held*, that it would be inequitable to decree his claim, as a decree in his favour would not confer upon him the benefit for securing which the right of pre-emption exists, namely, the enjoyment of his own property without molestation from undesirable neighbours.

Sakina Bibi v. Amiran and others (I. L. R., X All., 472), and *Ram Gopal v. Piari Lal* (I. L. R., XXI All., 441), referred to. ATMA RAM *v.* DEVI DYAL AND ANOTHER 49

8. *Custom—Pre-emption—Mohalla Kazianwala, Dera Ismail Khan—Burden of proof.*—*Found*, that plaintiff has failed to prove the existence of a custom of pre-emption in Mohalla Kazianwala, Dera Ismail Khan.

In suits for pre-emption in respect of property situate in a town, where the custom is not universal, it is necessary for the plaintiff to prove that it exists in the particular Mohalla in question or throughout some larger area of which it forms a part. TAGGA *v.* ALLAH BAKHSI ... 69

9. *Sale to a co-sharer—Pre-emption—Suit by another co-sharer who was also a collateral of the vendor—Superior right—Custom—Punjab Laws Act, 1872, Section 12—Riwaj-i-am.*—*Held*, that in *marza Patni, tahsil Jampur, Dera Ghazi Khan district*, a co-sharer of a vendor, who is also his relation, has a superior right of pre-emption than other co-sharers who are not relations of the vendor. DIN MUHAMMAD *v.* KAEIM BAKHSI AND ANOTHER 73

10. *Pre-emption—Purchase money—"Good faith"—Punjab Laws Act, 1872, Section 16, clauses (c) and (d).*—The law of pre-emption, though it does operate to keep down the price of property to some extent by hampering transfers, is not intended to have that effect, it merely aims at protecting the prior rights of purchase of certain persons on specific grounds, and as it stands cannot be interpreted to deprive the owner of the right to make the most he can of his property, and there is nothing improper to demand or to pay a price much above the market value. Therefore in a case for pre-emption where the price entered in the deed of sale, though considerably above the market value, was not shown to be fictitious, and where there was

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no proof nor indication that any portion of it was refunded or otherwise appropriated, *held*, that the price was fixed in good faith. PHUMMAN MAL v. KEMAN 75

11. *Pre-emption—Purchase of property in payment of previous debts—Market value—Good faith.*—In a case for pre-emption where the transfer was in satisfaction of old debts if the market value of the property does not appear to differ very materially from the amount of the debts due from the vendor, and the price actually paid is the cancellation of all the liabilities mentioned in the deed, the price so paid may be held to have been fixed in good faith; but where the disparity between the market value of the property and the sum in satisfaction of which it has been accepted is very great, and the debtor is clearly insolvent, and the property in question taken in satisfaction was practically the debtor's only asset, the market value of the property is the proper test of the value of the consideration paid, and not the nominal amount of the debts due. VIR BHAN v. MATTU SHAH ... 77

12. *Custom—Pre-emption—Pre-emption on sale of shop—Bazar Chauhatta, Mufti Bakar, Lahore City—Punjab Laws Act, 1872, Section 11—Burden of proof.*—*Held*, that plaintiff had failed to prove the existence of a custom of pre-emption in respect of sale of shops in Bazar Chauhatta, Mufti Bakar, of Lahore City.

Held, also, that a *baithak* on the top of two shops does not alter the nature of the property which property could not in consequence be considered a residential house.

(The subject of *guzars* in Lahore City discussed). HAKIM RAI v. MUHAMMAD DIN AND OTHERS 83

13. *Custom—Pre-emption—Kucha Chabuk—Mohalla Qazi Sadr-ud-din, guzar Rara, in the City of Lahore—Sawaran.*—*Found*, that the custom of pre-emption does not exist in respect of sale of houses in *kucha* Rang Mahal, which is a part of *kucha* Chabuk Sawaran, otherwise known as *kucha* Kakkazaian, Mohalla Qazi Sadr-ud-din, guzar Rara, in the City of Lahore.

Held, that the law of pre-emption requires a certain stringency in deciding the question of the existence of such a custom in a city or subdivision thereof, and does not permit a finding in its favour simply on the ground that it exists in the neighbouring subdivisions if there is no instance in the quarter in which the disputed property is situate.

Raman Mal v. Bhagat Ram (17, P. R., 1895), Thakar Das v. Muhammad Bakhsh (100, P. R., 1892), Sandagar Mal v. Aman Singh (70, P. R., 1899), and Natha Singh v. Billa Singh (50, P. R., 1900), followed. IMAM-DIN v. GHULAM MUHAMMAD AND OTHERS 86

14. *Pre-emption—Sale of occupancy right to a tenant with rights of occupancy in the village—Suit for pre-emption by landlords of the holding who did not proceed under the provisions of Section 53 of the Tenancy Act, 1887—Superior right—Punjab Laws Act, 1872, Section 12—An old tenant who had under the Wajib-ul-arz full power of alienation*

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sold his occupancy holding to another tenant with rights of occupancy in the village, the landlords of the holding filed a suit for pre-emption. The vendees contended that they being the tenants with rights of occupancy in the village have, under the last clause of Section 12, priority over them, as the pre-emptors who were the landlords of the holding had not proceeded under Section 53 of the Tenancy Act.

Held, that as the operation of Section 53 of the Tenancy Act was excluded by Section 111, the entry in the *Wajib-ul-arz* being tantamount to an agreement under Section 112, the last clause of Section 12 of the Punjab Laws Act could not apply, and the parties are relegated to their position under the first clause of that Section by which the landlords have a superior right of pre-emption. SUNDAR MAL AND OTHERS *v.* SAWAN SINGH AND OTHERS 87

15. *Pre-emption—Sale—Assignment of immoveable property by husband to wife in lieu of her dower.*—A husband transferred his immoveable property to his wife in lieu of her dower, the value of the property purporting to be transferred being considerably in excess of the amount of dower due. *Held*, that such transfer was not a sale, but to a great extent a gift, and was therefore not subject to pre-emption.

Fida Ali v. Muzaffar Ali (I. L. R., V All., 65), distinguished. MIR ZAMAN KHAN AND OTHERS *v.* MUSSAMMAT GHULAM FATIMA 88

16. *Custom—Pre-emption on sale of shop—Hissar City.*—*Found*, that the custom of pre-emption in respect of sale of shops exists in the town of Hissar. BHAGWANA AND OTHERS *v.* HANWANTA 90

17. *Pre-emption—Claim by a co-sharer—Right of a co-sharer who parted with his own property prior to the institution of suit and of one acquired her share subsequent to the sale.*—Where a sale of half share in five shops was made on 4th October 1898 and subsequently the owner of the other half share gifted all his property including his half share in the shops to his mother, and then jointly with his mother instituted a suit for pre-emption in respect of the above sale.

Held, that the son was not competent to sue as he had parted with his ownership before the suit, his rights being lost with the loss of the ownership by transfer, and that the mother had no right to sue as the transfer of the property by gift to her could not confer on her any right to sue in respect of property which was sold before she had become owner of the property through which the right of pre-emption was claimed. *Semble*: Right of pre-emption is personal and incapable of being assigned. MUHAMMAD AYUB KHAN AND ANOTHER *v.* RURE KHAN AND OTHERS 95

18. *Pre-emption—Sale of share of joint estate—Vendor, purchaser and pre-emptor, all three being co-sharers in the joint estate—Vendor's election where parties are equally entitled—Punjab Laws Act, 1872, Section 12 (a).*—The plaintiff sued for possession by pre-emption of land sold by his brother to the defendant, all three being co-sharers, together with

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several others who had not elected to claim their right in the joint estate included in the land in dispute. The purchaser pleaded that the penultimate clause of Section 12 defeated the plaintiff's claim.

Held, that under clause (a) of Section 12 of the Punjab Laws Act, 1872, the plaintiff was entitled to half the bargain on payment to the purchaser of half the price, the right of pre-emption under such circumstances being a joint right of the co-sharers, and that the penultimate clause of that section did not apply to such cases.

Gimi v. Sahib (91, P. R., 1875), *Karim Bakhsh v. Khuda Bakhsh* (29, P. R., 1881), *Ishar Singh v. Mangal Singh* (117, P. R., 1883), *Bhag v. Muhammad Yar* (17, P. R., 1884), and *Mughal v. Jalal* (69, P. R., 1893), distinguished. *Ahmad Din v. Mussannat Hasso* (54, P. R., 1882), *citel.* ASA RAM v. KAMA AND ANOTHER

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PRINCIPAL AND AGENT.

Badni Contracts—Void Contract—Suit for profits received by defendants as plaintiff's agents—Liability of agent to render accounts to his principal.

See Contract Act, 1872, Section 30.

PROPERTY.

Distinction between the right to alienate the property acquired from adoptive and a natural father.

See Custom—Alienation, No. 4.

PUBLIC COMPANY.

Power and authority of Directors—Articles of Association—Ratification by Company of acts ultra vires of Directors—Conditions vital to contract or merely ancillary to it—Evidence as regards.--Where Articles of Association of a Company empowered the Directors generally to do all such acts as under the Indian Companies Act and Articles of Association are directed or authorized to be done by the Company in General Meeting, *held*, that this authority did not absolve the Directors from the necessity of observing the established principal which should regulate their management of the Company's affairs, and if their acts were not reasonably necessary for efficient management, the Company would not be bound by them. *Held, further*, that to establish ratification by the Company of acts *ultra vires* of the Directors it was necessary for the plaintiff to prove (1) that the shareholders present at the meeting at which it was alleged that ratification had been accorded had clear knowledge of what was to be ratified, and (2) that the absent shareholders had individually assented to the ratification.

The references are to the Nos. given to the cases in the "Record."

No.

PUBLIC COMPANY—*conclld.*

Whether a particular clause in an agreement should be held to embody a condition vital to the contract, or one subsidiary to its main purpose must depend upon the intention of the contracting parties, and if possible that intention should be gathered from the terms of the agreement itself.

Ashbury Railway Carriage and Iron Company v. Riche (L. R., 7 H. L., 653), *Houldsworth v. Evans* (L. R., 3 H. L., 263), and *Phosphate of Lime Company v. Green* (L. R., 7 C. P., 56), referred to. TARA CHAND v. THE GANESH FLOUR MILLS COMPANY, LIMITED, DELHI

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PUBLIC DRAIN.

Municipal Committee's power to carry water into a public drain.

See *Nuisance*.

PUBLIC POLICY.

Illegality of assignment of or sub-letting of contract as opposed to public policy.

See *Contract*, No. 2.

PUNJAB COURTS ACT, 1884.

SECTION 3.

Suit for the cancellation of an auction sale of a house sold in execution of a money decree not exceeding Rs. 100—Valuation of suit.

See *Jurisdiction*, No. 1.

"Land suit"—*Punjab Courts Act, 1884, Section 3—Punjab Tenancy Act, 1887, Section 4.*—The plaintiffs sued to demolish a building erected by the defendant and to restore to its original condition the site which the plaintiff described as having been used for pasturing cattle, but which no doubt had been enclosed by a wall when the plaint was filed.—*Held*, that the suit was a "land suit" within the meaning of Section 3 of the Punjab Courts Act, 1884, the true principal for a decision whether a suit is a "land suit" being to have regard to the character and use of the land at the time immediately before the cause of action has arisen. The use to which the defendant may have devoted the land after the cause of action has arisen is immaterial as determining the nature of the suit brought to contest his wrongful appropriation of it.

Hayat v. Sant Ram (20, P. R., 1894), referred to. MAWASI v. $\frac{5}{2}$ MAYA RAM

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SECTION 18.

Power of Revenue Officers to settle the boundaries of Districts.

See *Civil Procedure Code*, 1882, Section 16 A.

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PUNJAB COURTS ACT, 1884—concl'd.

SECTION 35.

Power of Court to execute decree in excess of the limits of its pecuniary jurisdiction as an original Court.

See *Civil Procedure Code*, 1882, *Section 6*.

SECTION 39.

Jurisdiction—Suit for pre-emption—Value of suit—Courts of Appeal.—Plaintiff sued for pre-emption of a house sold for Rs. 150 to the defendant on the allegation that the actual sale consideration and the market value were Rs. 82. The relief sought was a decree for possession of the house subject to payment of Rs. 82 or the market value or such sum as the Court might fix. The first Court (Munsif, 2nd class) found the market value to be Rs. 82 and decreed the claim. The vendee appealed to the District Judge who returned the appeal for presentation to the Divisional Court, the latter considering the question of jurisdiction a doubtful one, submitted the case to the Chief Court, under Section 617, *Civil Procedure Code*.—*Held*, that as it could not be affirmed upon the plaint that the value of the suit did not exceed Rs. 100, the appeal lay to the Divisional Court and not to the District Judge.

Hazara Singh and others v. Lal Singh and others (63, *P. R.*, 1891), *Muhammad Khan v. Ashak Muhammad Khan* (106, *P. R.*, 1895), and *Haider Khan and others v. Ali Akbar Khan and others* (18, *P. R.*, 1897), followed. SHAMAN *v.* SUNDER 32

SECTION 40 (i).

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SECTION 70.

1. *Order of District Judge fixing the fee of a custodian of the property of the ward appointed under Section 12 of the Guardian and Wards Act, 1890—Revision.*

See *Appeal, Civil*, No. 1.

1. *Revision—Chief Court's powers of—Practice—Civil Procedure Code*, 1882, *Section 622*.—*Held*, that as a general rule the Chief Court will not exercise its extraordinary powers of revision under Section 70 of the Punjab Courts Act, as amended by Act XXV of 1899, on the ground that a subordinate Court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction with material irregularity, so long as there is any other remedy open to the party professing to be injured whereby he may obtain the relief sought. JOTI MAL *v.* COATES 15

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SECTION 9 (3).

Effect of, on appeals in suit for foreclosure of mortgages pending at the time the Act came into force.—Held, that sub-section 3 of Section 9 of the Punjab Land Alienation Act, 1900, does not apply to appeals filed in the Chief Court before the Act came into force. HARBHAGWAN v. SHAMUN AND OTHERS 94

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PUNJAB LAWS ACT, 1872.

SECTION 5.

1. *Presumption in favor of the existence of a custom—Non-agriculturists.*

See Custom, No. 1.

2. *In the absence of a proved positive custom regarding the right of inheritance, rules of personal law of the parties must be followed in accordance with the provisions of Section 5 of the Punjab Laws Act, 1872. SHERAN v. MUSSAMMAT SHARMAN 117*

SECTION 10.

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See Pre-emption, No. 12.

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1. *Sale to a co-sharer—Suit for pre-emption by another co-sharer who was also a collateral of the vendor—Superior right—Custom.*

See Pre-emption, No. 9.

2. *Sale of occupancy right to a tenant with rights of occupancy in the village—Suit for pre-emption by landlords of the holding who did not proceed under the provisions of Section 53 of the Tenancy Act, 1887—Superior right.*

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The references are to the Nos. given to the cases in the "Record."

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PUNJAB LAWS ACT, 1872—*concl'd.*

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Effect of Punjab Limitation Act, 1900, on claims barred under the Limitation Act, 1877, before it came into force—Held, that the right to sue barred under Act XV of 1877 before the Punjab Limitation Act (I of 1900) came into force was not revived by that Act. TEKA v. SOHNU

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And Section 95—Erection of a building—Bridging over a drain—Distinction between—Conditional sanction.—The plaintiffs having applied to the Municipal Committee for permission to roof over the drain in front of their gates, the Municipal Committee by a resolution which was passed more than five months after the date of the application agreed to allow the drain to be roofed, provided that the plaintiffs executed an agreement disclaiming all title to a piece of land between the drain and their compound wall. The plaintiffs in the meanwhile had roofed the drain, and as they did not execute the agreement relinquishing their right to the land between the drain and their compound wall, the Municipal Committee issued a notice to them to remove the roofing over the drain. The plaintiffs sued for an injunction to restrain the threatened demolition and justified their acts under clause 5 of Section 92 of the Municipal Act, inasmuch as the

The references are to the Nos. given to the cases in the "Record."

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PUNJAB MUNICIPAL ACT, 1891—concl'd.

Committee had neglected to pass orders on their application within six weeks.—*Held*, that Section 93 was not applicable to the case, for though the bridging of the drain came within the meaning of erection of a building in Section 92, that section is governed in the matter of building over a drain by Section 95, and so the written permission of the Municipal Committee was necessary. But, *held*, further, that the imposed condition was *ultra vires*, and that the plaintiffs were entitled to the injunction. The Municipal Committee, while acknowledging that there was no objection to the erection, was not empowered to compel the applicant to do something quite foreign to the object of the application, and to the purpose and object for which the power of sanction was given.

Matsudi Mal v. Municipal Committee Bherani [6, P. R., 1891, (Crim.)], *Nagar Valab Narsi v. The Municipality of Dhandhuka* (I. L. R., XII Bom., 490), *Badri Das v. Municipal Committee of Delhi* (90, P. R., 1898), *Chopal Buta v. The Municipal Committee of Simla* [24, P. R., 1890 (Crim.)], and *Olivant v. Rahamtulla Nur Muhammad*, (I. L. R., XII Bom., 474), referred to. DAMODAR DAS v. MUNICIPAL COMMITTEE, DELHI 27

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"LAND SUIT."

See *Punjab Courts Act, 1884, Section 3.*

SECTION 4, CLAUSE 5.

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2. *Sale of occupancy right to a tenant with rights of occupancy in the village—Suit for pre-emption by landlords of the holding who did not proceed under the provisions of Section 53 of the Tenancy Act, 1887—Superior right.*

See *Pre-emption, No. 14.*

The references are to the Nos. given to the cases in the "Record."

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PUNJAB TENANCY ACT, 1887—*concl'd.*

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Record-of-Rights—Application of general customs of agriculturists as entered in the record-of-rights to every landowner of the village.—Khatris, although following agricultural pursuits, cannot be presumed to have adopted the general customs of agriculturists in matters of succession and alienations, and the record-of-rights cannot operate to make a Khatri proprietor an agriculturist subject to customs which govern the latter. The presumption is that a Khatri is only bound by so much of the record-of-rights as deals with pre-emption and similar customs. HARNAM SINGH v. DEVI CHAND 107

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SECTION 24.

Registration—Registration of a document under Section 24 of Act III of 1877—Finding of Registrar—Validity—Where a sale-deed was presented for registration within six months of its execution and was dealt with under Section 24 of the Registration Act, the vendor admitting execution, but pleading non-payment of a large portion of the consideration, and was registered on payment of a penalty under that section.—Held, that the Registrar's finding as to the existence of the circumstances mentioned in Section 24 of the Registration Act must be accepted, and the validity of the registration cannot be questioned in a suit instituted by the vendee nearly five years after registration.

Raya Raghoba Kamat v. Anupurna Bai (X Bom., H. C. R., 98), and Bhagal Singh v. Ram Narain (93, P. R., 1883), distinguished. KHATIR MUHAMMAD v. ABDUL GHAFFAR KHAN 44

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Held, that the suit must be limited to matters covered by the sanction, and that the plaintiffs were not competent to sue for the removal of the defendant from the office of *mahant*, the Court having no authority to enlarge the scope of the suit and to grant any other reliefs other than those included in the terms of the sanction.

Held, also, that the *mahant* of a religious institution is presumed to be the manager of the institution over which he presides, and is not bound to submit accounts for the information or approval of the worshippers at the shrine unless it is proved by evidence that it is the custom and practice of the institution for him to do so. Civil Courts are not justified in forcing a scheme of management on a religious or charitable institution unless there is clear proof that there has been such mismanagement or misconduct as calls for judicial interference. *PREM SINGH v. LABH SINGH AND OTHERS*

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Civil Procedure Code, 1882, Section 13—Res judicata—Competency of Court to try subsequent suit.—In order to make a matter res-judicata concurrency of jurisdiction is essential. Where the former suit

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RES JUDICATA—*conclld.*

was exclusively triable by a Revenue Court and for the proper trial of such a suit that Court had to decide incidentally every point including that of the subject-matter of the present suit, the decision of that Court, it not being a Court of jurisdiction competent to try the present suit, was not binding on the Civil Court and the present suit was not barred by the rule of *res-judicata*.

Mussammatt Edun v. Mussammatt Bechun (8, W. R., 175, F. B.) and *Ran Bahadur Singh v. Lucho Koer* (I. L. R., XI Cal., 301 P. C.), followed. SULTAN HABIBULLAH KHAN v. MOHABAT KHAN... ..

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3. *Joint promise to plaintiff and others—Right of plaintiff to sue alone—Cause of action.*

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4. *Hindu Law—Alienation by Hindu widow—Right of collaterals to question such alienation in presence of daughters and their sons—Collusion.—Held, that where the daughters and their sons are held to be the heirs of a deceased male proprietor, the collaterals cannot maintain their action unless they can prove that the abstention of daughters and their sons, who are heirs, were in collusion with the widow, or did not sue for some improper and insufficient reasons.* WISHAN DAS *v.* THAKAR DAS

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SMALL CAUSE COURTS ACT, 1887.

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it incorrect, and there was no reason to think that injustice has been committed the Chief Court declined to use its discretionary power of revision under Section 25 of the Provincial Small Cause Courts Act.

Secretary of State for India in Council v. Johnson (79, P. R., 1888),
The Poona City Municipality v. Ramji Raghunath (I. L. R., XX Bom.,
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Semle :—Act VII of 1889 does not require a Court to dismiss a plain-
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 Section 4 only enacts that in the absence of the certificate a decree
 shall not be passed. There is nothing to preclude the Court from stay-
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ALLAH DITTA AND OTHERS,—(PLAINTIFFS),—
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Versus

ABDUL QADIR KHAN AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

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Jurisdiction—Suit for possession of land—Uncertainty as to the Court's jurisdiction—Civil Procedure Code (Act XIV of 1882), Section 16 A—Power of Civil Court to adjudicate on the correctness of boundaries laid down by the Settlement authorities—Punjab Courts Act (XVIII of 1884), Section 18.

In a suit by the proprietors of *mouza* Bharthwali in Muzaffargarh District for a declaration that certain land awarded to the proprietors of Kachur in the Mooltan District by the Settlement authorities in a boundary dispute belongs to them and should be included within their village, the decree given by the Munsif in the plaintiffs' favour was reversed on appeal by the Divisional Judge, on the grounds that as by the orders of the Settlement Officers the disputed area at the time of the institution of the suit formed part of the Revenue District of Mooltan, and as the Revenue Officers had complete power to settle the boundaries of districts, and as such orders could not be questioned by a Civil Court, the Munsif of Muzaffargarh acted without jurisdiction.

Held, that the Civil Court had jurisdiction to go into the question of the correctness of the boundaries laid down by the Settlement authorities.

Held, also, (1) that the Munsif, having raised the point of jurisdiction himself and decided that he had jurisdiction, substantially complied with the provisions of sub-section (1), Section 16 A of the Code of Civil Procedure, and

(2) that at best the proper place of institution was uncertain, and the objection not having been taken in the first Court, the Divisional Judge should not have allowed it with reference to sub-section (2) of Section 16 A.

Combe v. Edwards (1), referred to.

Further appeal from the order of J. G. M. Rennie, Esquire, Divisional Judge, Mooltan Division, dated 15th February 1900.

Oertel, for appellants.

Lal Chand, for respondents.

The following judgment was delivered by the learned Judge :

30th July 1900.

CHATTERJI, J.—This is an appeal from a decree of the Divisional Judge, Mooltan Division, reversing a decree of the Munsif of Muzaffargarh in a suit by the proprietors of *mouza* Bharthwali in that District for a declaration that certain land awarded to the proprietors of Kachur in the Mooltan District by the Settlement authorities in a boundary dispute belongs to them, and should be included within their village. Civil Appeal No. 236 of 1900 is a similar appeal in a suit of the same kind between the proprietors of Lalpur in the Muzaffargarh District and those of Kachur. The lower Appellate Court has reversed the decrees of the Munsif in both cases on the same ground, *viz.*, that the Court has no jurisdiction to entertain the claims as the land was situated in the Mooltan District at the time of institution of the suits. Both appeals will be disposed of by one judgment.

The Divisional Judge appears to have completely ignored the provisions of Section 16 A of the Code of Civil Procedure. His grounds of decision are that (1) the Revenue Officers have complete power to settle the boundaries of districts, and the boundaries so settled cannot be questioned by the Civil Court; (2) the question whether the disputed land forms part of the Revenue District of Mooltan has been finally settled by the orders of the Settlement Officers; and (3) Notification No. 833, dated 30th October 1885, para. 2, lays down that the boundaries of the Civil District shall be the same as those of the Revenue and Administrative districts of the same name, and it must be presumed that they alter as those of the Revenue and Administrative districts alter.

I cannot agree with the Divisional Judge that Revenue Officers have complete power to settle the boundaries of Districts which cannot be called in question by the Civil Courts. Under Section 18 of the Punjab Courts Act the limits of Civil Districts are to be fixed by the Local Government. Under Section 5 of the Land Revenue Act the limits of Districts can be altered only by the Local Government. The same rule applies to Districts for the administration of criminal justice, *vide* Section 7 of the Code of Criminal Procedure.

The Revenue Officers are empowered to settle boundary disputes between villages and to lay down the boundaries of villages, but their decision is liable to be set aside by the Civil Court. There is no provision in the Land Revenue Act making their decision final. This was explained to the Civil Courts so far back as June 1888 by Book Circular VI—2527 of 1888, dated 14th June 1888, in which the different provisions of the Punjab Courts and Land Revenue Acts were reviewed and the restrictive provisions of Section 158 of the latter Act referred to and shown not to effect a boundary dispute like the present which is really a *hadd shikni* one. The Circular states that it was issued with the concurrence of the Financial Commissioner, and in my opinion the correctness of the views enunciated in it is not affected by any change in the law since its issue. Clause (xviii a) of Section 158 relates to boundary disputes between riverain villages when a special order has been passed by the Local Government fixing a permanent boundary under Section 101 A, and excludes the jurisdiction of Civil Courts over questions relating to, or arising out of, proceedings under the latter Section and Sections 101 B, 101 C, and 101 D. It has no application to a suit of the nature before us. I do not think clause (1), sub-section 2, Section 158, applies to the present suits, though Mr. Madan Gopal in his note to it in his valuable work on the Land Revenue Act is of that opinion. The learned author appears to have overlooked the Circular.

I hold, therefore, that the Civil Court has jurisdiction to go into the question of the correctness of the boundaries laid down by the Settlement authorities. I observe this was not questioned by the Divisional Judge.

There is a later Notification by the Local Government mentioned by the Munsif, *viz.*, No. 440, dated 8th June 1893, defining the boundaries between the Districts of Muzaffargarh and Mooltan in the Chenab riverain tract which has a more immediate application than the Notification of 1885 referred to by the Divisional Judge. It lays down that the common boundaries of the ownership of the estates mentioned in column 3 of the schedule attached to it on the one hand and those specified in column 4 shall constitute the common boundaries of the Districts set forth in columns 1 and 6. According to the schedule the common boundaries of Gogra and Kachur on one side and Bharthwari on the other and Jambhar and Mizanpur on the one hand and Lalpur on the other, form the common boundaries of the Mooltan and Muzaffargarh Districts in that part of the Chenab

River. See *Punjab Gazette* of 15th June 1893, Part I, pages 293, 294.

The Munsif's interpretation of the Notification does not appear to me to be correct, but if the Civil Court is not bound by the decision of the Settlement authorities I do not see how its jurisdiction can be ousted by the mere fact of such decision having been passed. The suit impugns the correctness of that decision, and the question is whether the common boundary line between Kachur and Muzaffargarh has been correctly laid down by the Settlement Officers. The Muzaffargarh Court had jurisdiction over the lands of Bharthwali generally before the decision and has so now, and the ousting of its jurisdiction in respect of the land in suit depends upon whether such boundary line has been rightly fixed. It does not affect the consideration of the question that the Settlement Officers profess merely to fix the old boundary. They could not do otherwise under the circumstances of this case, but still the point remains whether the old boundary has been correctly fixed. The plaintiffs deny this, and the Civil Court has to decide it.

The Notification lays down the limits for purposes of Civil, Criminal and Revenue administration, but it does not say that the decision of the Revenue authorities in regard to the common boundaries of the villages mentioned in the schedule will *ipso facto* affect the limits of the Civil District and the jurisdiction of the Civil Courts, and this cannot be inferred if the power of the Civil Courts to give relief against the action of the Revenue Officers is conceded. The argument *ab inconvenienti* applies with at least equal force, if not much more, in favour of the view that it does not as in favour of the view that it does.

Upon a careful consideration of the subject I cannot see how the jurisdiction of the Civil Court is ousted by the act of the Settlement Officers if the power of the former to give relief against it is postulated. The latter is a more vital point of jurisdiction than the former.

At least the matter must be held to be one in which there is reasonable doubt.

Another point to be noted in this connection is that the Notification, at any rate, is no help in deciding the question of jurisdiction in the dispute between Kachur and Lalpur as the common boundaries of those villages are not laid down in it as part of the common boundaries of the two districts, so far as

the case between these two villages is concerned the plaintiffs appear to have sued in the right Court.

Local jurisdiction in respect of suits for possession of immovable property is regulated by Section 16 of the Code of Civil Procedure. It is not a question of essential jurisdiction which relates to the competency of the Court to adjudicate on the claim with reference to its nature and value. The distinction is well known in jurisprudence (*Combe v. Edwards* ⁽¹⁾) at page 130) and is recognized in the proviso to sub-section 1 of Section 16 A of the Code. Essential jurisdiction is far more important than any other as it has relation to the constitution of the Court. No such question arises in the present case.

Section 16 A provides a remedy in cases of doubt regarding jurisdiction other than essential jurisdiction. Now in the present instance the defendants raised no question about the suit having been instituted at the wrong place. The Munsif raised it himself and heard the arguments of the plaintiffs' pleader. He decided in the judgment that he had jurisdiction. He did not, as far as I can gather from the papers, record any statement that there was any uncertainty and then proceed to entertain and decide the suit. Had he done so his decree could not have been attacked on the ground on which it has been reversed by the Divisional Judge.

It may be contended with reason that in first noticing the question at an intermediate stage and then deciding it in favour of his Court the Munsif has substantially complied with the law. If a Court, being satisfied that there is ground for uncertainty, can validly exercise jurisdiction by merely recording a statement to that effect, cannot his adjudication be said to be equally effective if he goes a little further and finds that the doubt is on the whole removed. It would, perhaps, be too technical to hold otherwise, but without going into this point I consider that sub-section (2) of Section 16 A furnishes the rule for decision in the present case. Let us take it for granted that the Munsif did not record any statement within the meaning of sub-section (1). The objection was not taken in the first Court. I have shown above that upon sound principles of reasoning the jurisdiction of the Court cannot be said to have been taken away by the act of the Settlement authorities. But waiving this there is in my opinion at least a reasonable ground for uncertainty at the time of the institution of the claim as to the Court having

⁽¹⁾ *L. R.*, 3, P. D., 103.

jurisdiction in respect of the same, and the Divisional Judge therefore should not have allowed the objection.

I accept the appeal, set aside the decree of the Divisional Judge, and return the case to him under Section 562, Civil Procedure Code, to dispose of the appeal on the merits: Court-fee on the petition of appeal to be refunded. Other costs to abide the event.

Appeal allowed, cause remanded.

No. 2.

Before Mr. Justice Robertson and Mr. Justice Maule.

DILAWAR AND ANOTHER,—(PLAINTIFFS),—
APPELLANTS,

Versus

MUSSAMMAT JATTI AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

APPELLATE SIDE. {

Further Appeal No. 147 of 1897.

Custom—Alienation—Alienation by widow—Locus standi of reversioners of the fifth degree—Domra Jats of the Dera Ismail Khan tahsil.

Found, that there was an established custom amongst Domra Jats of the Dera Ismail Khan tahsil that no male collateral, not descended from a common great-grandfather, along with a deceased person, whose widow had alienated the deceased's property, had a right to object to such alienation.

Rahmat Hussain and others v. Mussammat Fahim-un-nissa ⁽¹⁾, referred to.

Further appeal from the order of R. L. Harris, Esquire, Divisional Judge, Derajat Division, dated 27th August 1897.

Sir W. Rattigan, Q. C., and Oertel, for appellants.

Lal Chand, for respondents.

The judgment of the Court was delivered by

29th March 1900.

ROBERTSON, J.—This was a suit to contest an alienation made by a Muhammadan Jat widow by a collateral of her deceased husband.

The facts of the case are fully set forth in the judgments of the Lower Courts and need not be recapitulated here. We do not propose to discuss the general propositions regarding customary law raised for the appellant at great length, because there are special features in this case which render it unnecessary. It may be that the view regarding the method of counting

⁽¹⁾ 25, P. R., 1895.

degrees of relationship expressed in *Rahmat Hussain and others v. Mussammat Fehim-un-nissa and others* ⁽¹⁾ is not universally accepted, and we might be inclined to doubt whether or not it is the custom in all parts of the Punjab. But in this case the necessity for discussing this point does not arise as the plaintiffs themselves in this case relied upon the entry in the *Riwoj-i-am* and signed the *Wajib-ul-arz* in which that entry in the *Riwoj-i-am* is specifically accepted. The entry therefore must be held to have been made in the *Wajib-ul-arz* as well as the *Riwoj-i-am*, and this undoubtedly increases its force whatever that force may amount to. The plaintiff as a matter of fact never contested the entry, and the general question whether any descendant of a common ancestor, however remotely connected with the deceased person whose property is in question, could contest such an alienation as that in this case, made many years ago by the deceased's widow, was only put forward at a late stage of the case by plaintiffs' pleader. How far the entry in the *Wajib-ul-arz* may be held to represent ancient custom, and how far only a suggested arrangement for the future, it is not necessary to discuss at length. But we may remark that it appears to be a very common state of opinion, at least amongst the agriculturists of certain tracts, that while a near collateral has the right of interference a more remote one has not, though the exact line of demarcation is difficult to lay down, and ideas on this point vary according to the strength of tribal or caste, or family feeling. The statement in which apparently the plaintiff and his fellow villagers all concurred that the right of interference was confined to those related to the deceased in the fourth degree may be taken as an expression of the views of the tribe as to the custom obtaining amongst them. It may often be very convenient to construct a thoroughly logical theory to cover all cases, but experience shows that custom is not by any means always logical, and that although it is difficult to support the right of veto on behalf of collaterals in the fourth degree and to contest it as regards collaterals in the fifth degree on *à priori* reasoning, people themselves undoubtedly do in some tracts recognize it as reasonable, and in accordance with custom that the line should be drawn somewhere, quite ignoring the more consistent theory that if it exists at all it should extend to all agnates. And it may be further argued, if that were desirable, that there is something at least of practical good sense sometimes in the view, a point with which we are not concerned. We find, however, that in the case of the village in question

(1) No. 25, P. R., 1895.

there was common consensus that the power of interference was restricted to collaterals who were descended from the great-grandfather of the deceased person. This is, in our opinion, what is clearly stated in the *Riwaj-i-am*, and this is what both Courts have found to be the fact. The *Riwaj-i-am* is very explicit both as to the degree of relationship and as to the manner in which those degrees are to be calculated, and it distinctly in our opinion provides that only relations within the fourth degree of remove from the deceased are entitled to object to such alienation as that in question, and any in the fifth degree are not entitled to do so. The plaintiff is not within the fourth degree of relationship calculated from the deceased to the common ancestor, and we are accordingly unable to see any reason to interfere with the concurrent findings of the two Lower Courts. Appeal dismissed with costs accordingly.

Appeal dismissed.

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No. 3.

Before Mr. Justice Chatterji and Mr. Justice Harris.

GIRDHARI LAL AND ANOTHER,—(PLAINTIFFS),—
APPELLANTS,

APPELLATE SIDE, {

Versus

DALLA MAL AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Further Appeal No. 1239 of 1897.

Custom—Adoption—Dhawan Khatri's of Ferozepore—Wife's sister's son—Ceremonies.

Found, that adoption of wife's sister's son among Dhawan Khatri's of Ferozepore was not opposed to custom or Hindu Law, and that, in the absence of proof as to the necessity of ceremonies in constituting such an adoption valid, an unequivocal declaration of intention coupled with previous and subsequent treatment would be sufficient for the purpose.

Ganda Mal v. Mussammat Radhi (1), referred to.

Further appeal from the order of Kazi Muhammad Aslam, Additional Divisional Judge, Ferozepore Division, dated 27th July 1897.

Lal Chand, for appellants.

Lajpat Rai, for respondents.

The judgment of the Court was delivered by

20th March 1900.

CHATTERJI, J.—This is a suit to declare the adoption of the defendant-respondent, Ghasita, by the defendant, Dalla Mal, by registered deed inoperative as against the rights of the plaintiff,

Gobinda Mal. Gobinda Mal, who is now dead and is represented by his minor sons, Girdhari Lal and Karam Chand, was Dalla Mal's own brother. The parties are Dhawan Khattris residents of the city of Ferozepore.

The deed recites in a general way that Ghasita was born in 1922 *Sambat*, and had lost his mother when he was five months' old, and been brought to the adoptive father's house and suckled by his wife who was Ghasita's mother's sister; that he had been adopted and brought up, betrothed and married by Dalla Mal as his son, and that the document is executed as a written declaration of his status and right as heir to Dalla Mal.

In the pleas the defendants alleged that the ceremonies of adoption took place in 1934 after the death of Dalla Mal's own son. The first Court did not believe this story as it was contrary to the recitals of the deed of adoption, but the Divisional Judge accepted it as true. Both Courts held the adoption proved in fact as well as valid, and dismissed the claim. The plaintiff appeals.

The substance of the argument of appellants' counsel is that the evidence as to adoption in 1934 is conclusively contradicted by the deed, and that in consequence it must be held that there never was a ceremonial adoption of Ghasita; that the deed of adoption is not sufficient for the purpose either under Hindu Law or custom, especially as it does not purport to make any adoption, but to declare and confirm one made in 1922 which is impossible as Dalla Mal's son was then alive, and that the evidence of treatment is not trustworthy and in any case not enough to constitute Ghasita the adopted son of Dalla Mal. Counsel did not contend that the adoption of a wife's sister's son is invalid under Hindu Law, but urged that the spirit of both Hindu Law and custom was against the adoption of any but an agnate.

We think the parties are presumably governed by custom, which is the primary rule of decision, though not necessarily by the custom of agricultural and land-holding tribes forming village communities. They relied on Hindu Law and custom in this Court. The custom of the superior non-agricultural Hindu castes resident in towns in regard to adoption does not generally differ in *essential particulars* from Hindu Law, but in the first instance resort must be had to custom and not to the text-books on Hindu Law. In this case no specific evidence was adduced as to custom except that plaintiffs' witnesses asserted that adoption is unknown among the brotherhood of Dhawans to

which the parties belong. No evidence was offered as to the necessity or otherwise of ceremonies in constituting a valid adoption. We think, therefore, that an unequivocal declaration of intention coupled with previous and subsequent treatment would be sufficient for that purpose. As to declaration there is the deed and the reiteration of the relationship in this very suit, while the evidence as to treatment and betrothal and marriage of Ghasita as Dalla Mal's son is quite satisfactory and has been rightly accepted as trustworthy by the Lower Courts.

We are further inclined to think that the recital in the deed as to the time of adoption is a mistake due to imperfect comprehension of the facts by the writer, and we cannot believe that Dalla Mal, when causing it to be written, forgot that his son was alive in 1922, and that in consequence no adoption could take place in that year. We have therefore on the whole no difficulty in accepting the evidence as to the formal adoption in 1934, notwithstanding the strictures of counsel. The plaintiffs' evidence is entirely of a negative character, and is mostly biased and interested. The ingenious objections of appellants' counsel as regards the want of ceremonies thus fall to the ground, and the adoption appears not to be opposed to custom or Hindu Law.

There is no serious contention against the validity of the adoption of a wife's sister's son, and we do not think there is anything in the argument that adoptions are unknown in the brotherhood of Dhawans to which the parties belong. They are Panjzati Khatri, and adoption is generally prevalent among the Khatri caste while there is a case, see *Ganda Mal v. Mussammatt Radhi* (1), in which adoption was found to prevail among Ferozepore Chopras one of the *zats*, or sections of the Panjzatis.

On the whole we think that both the *factum* and the validity of the adoption are established.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

(1) 57, P. R., 1886.

No. 4.

Before Mr. Justice Harris and Mr. Justice Rattigan.

SAYAD ZAHUR-UL-HASSAN,—(DEFENDANT),—
APPELLANT,

Versus

GANDA MAL,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Further Appeal No. 1364 of 1896.

Civil Procedure Code, 1892, Section 108—Decree ex-parte—Jurisdiction of District Judge to re-open an ex-parte decree which was appealed against to the Chief Court by the plaintiff.

In a suit where the plaintiff on obtaining an *ex-parte* decree for the major portion of his claim had unsuccessfully appealed to the Divisional Judge and the Chief Court as regards the portion disallowed, the District Judge, on the application of the defendant, after the decision of the Chief Court, re-opened the case under Section 108 of the Code of Civil Procedure.

Held, that under Section 108 of the Code the only Court which had jurisdiction at the time the application was made was the Chief Court, and that the action of the District Judge in setting aside a decree which in point of law was no longer existent at the time was altogether *ultra vires* and void.

Further appeal from the order of J. A. Anderson, Esquire, Divisional Judge, Amritsar Division, dated 29th August 1896.

Muhammad Shaffi, for appellant.

Jaishi Ram, for respondent.

The judgment of the Court was delivered by

RATTIGAN, J.—On the 9th January 1888 plaintiff sued Jat 15th Augt. 1900. Mal, Gokal Chand and Zahur Shah for adjustment of accounts, the proceedings being *ex-parte* as against the last named.

The first Court on the 9th May 1888 granted a decree for Rs. 2,228-11-0 payable by the defendants in the following proportions, *viz.*, Rs. 650. by Jat Mal and Gokal Chand, and Rs. 1,478-11-0 by Zahur Shah.

Plaintiff appealed to the Divisional Judge who, by an order dated 11th March 1889, remanded the case for further inquiry as regards interest on the *mesne* profits claimed. This order expressly states that Zahur Shah was present at the hearing before the learned Judge. A return was duly made to the remand order and the appeal was eventually dismissed by the Divisional Judge on the 16th October 1889. Thereupon plaintiff preferred a further appeal to the Chief Court which was also dismissed on the 15th June 1891. Zahur Shah was made a respondent in this appeal, but there is nothing to show

whether it was decided *ex-parte* against him or not. On the 10th February 1892 Zahur Shah applied under Section 108, Civil Procedure Code, to the District Judge, to set aside the *ex-parte* decree of the 9th May 1888. Plaintiff objected that as the only subsisting decree was that passed by the Chief Court on the 15th June 1891, the District Court had no jurisdiction to set aside the decree, but his objection was overruled. He thereupon applied to this Court on the revision side, and his application was disposed of by the late Chief Judge who held that as an appeal lay from the final order in the case, no application for revision was entertainable. The case was then re-opened, and on the 26th March 1894 the District Judge granted plaintiff a decree against Zahur Shah for Rs. 1,478-11-0. Zahur Shah appealed to the Divisional Judge, and plaintiff at once raised the question whether the District Court had jurisdiction to set aside the former decree. The learned Divisional Judge by a preliminary order, dated 4th July 1894, overruled the objection mainly on the ground of "convenience." Thereafter the case was twice remanded for further inquiry and ultimately the decree of the District Judge was varied and a decree passed against Zahur Shah for Rs. 771-5-0 on account of profits + Rs. 500 on account of the value of 35 trees, making a total of Rs. 1,271-5-0. As to costs, it was ordered that "plaintiff should get his costs proportionate to decree throughout with five-sixths of costs in resisting revival of case after it had been heard *ex-parte* if the Chief Court order allows this."

Zahur Shah has appealed to this Court, and on the appeal coming on for hearing before us, Bakhshi Jaishi Ram, for respondent, raises as a preliminary objection, the contention that the District Judge acted without jurisdiction in re-opening the case, as the only decree that subsisted at the time when the application under Section 108, Civil Procedure Code, was made, was that of the Chief Court, dated 15th June 1891. We are of opinion that this objection must prevail. The decree of the District Judge of the 15th May 1888 merged in the decree of the Divisional Judge of the 16th October 1889, and the latter decree itself merged in this Court's decree of the 15th June 1891, and under Section 108 of the Code the application to set aside an *ex-parte* decree must be made to the Court which passed that decree. The only Court, therefore, which had jurisdiction to set aside the former decree was the Chief Court, and the action of the District Court in setting aside the decree of the 15th May 1888, which in point of law was no longer existent at the time, was altogether *ultra vires* and void. As

a result, the whole of the proceedings subsequent to the grant of the application under Section 108 are of no effect and invalid. We must accordingly set all these proceedings aside, thus leaving the matter in *statu quo* after the decree of this Court in June 1891.

We think that plaintiff should be awarded as costs five-sixths of the actual amount expended by him in the course of the proceedings now set aside, and we order accordingly.

Appeal dismissed.

No. 5.

Before Mr. Justice Rattigan.

WALI MUHAMMAD,—(DEFENDANT),—APPELLANT,

Versus

RAMJI LAL,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Further Appeal No. 526 of 1900.

Mortgage—Conditional sale—Foreclosure—Regulation XVII of 1806—Strict compliance with conditions—Demand for payment of the specific amount—Mistake in the heading of the notice—Official designation not in the handwriting of the Judge—Wrong description of the property mortgaged.

In a suit for possession after foreclosure of a mortgage by conditional sale under Regulation XVII of 1806, it was contended by the mortgagor (i) that no demand for payment of the specific amount due under the mortgage previous to the issue of the notice had been proved; (ii) that the notice issued was defective and invalid, inasmuch as the heading was wrong and incorrectly described the Regulation under which it was issued; (iii) that the official designation of the officer was not in his own handwriting; (iv) that the property mortgaged was wrongly described, and (v) that a copy of the application and the notice were not duly served upon him.

Held, that under Section 8 of the Regulation a demand for payment is a condition precedent to the validity of the notice to be thereafter issued, and that an omission to make it would vitiate the foreclosure proceedings, but it was not essential that the exact amount due should be distinctly specified in it; and that there was sufficient evidence to prove that a demand had been made before the notice was issued, and that copies of application and notice had been duly served.

That the heading of the notice, *i.e.*, *notis ba illat dafa 8, Regulation Saturday, 1880*, though undoubtedly wrong as it incorrectly described the Regulation under which it was issued was immaterial and surplusage as the section makes no provision for a heading in any particular form.

That a notice signed in his own name by the Judge was not defective merely because the official designation was impressed with a rubber stamp, and

That as the Regulation does not require any specified description of the property to be entered in the notice, the mistake was innocuous.

Wasawa Singh v. Rura ⁽¹⁾, followed. *Ram Chand v. Ghulam Muhammad* ⁽²⁾, explained. *Karan Singh v. Mohan Lal* ⁽³⁾, *Forbes v. Amir-un-nisa* ⁽⁴⁾ and *Sham Singh v. Karm* ⁽⁵⁾, referred to.

Further appeal from the order of W. A. Harris, Esquire, Divisional Judge, Delhi Division, dated 29th March 1900.

Muhammad Shaffi, Narinjan Das and Fazal Din, for appellant.

Lal Chand, for respondent.

The judgment of the learned Judge was as follows :

10th Aug. 1900.

RATTIGAN, J.—This is a suit by a mortgagee for possession after completion of the foreclosure proceedings under Regulation No. XVII of 1806, and the question with which I have to deal on this appeal is whether the imperative requirements of the Regulation were duly observed. The objections taken by appellant to the validity of those proceedings are as follows :—

(1). The mortgagee has not proved that a demand for payment of the specific amount due under the mortgage was made previously to the issue of the notice.

It is not denied by the learned pleader for the respondent that a demand for payment is, under Section 8 of the Regulation, a condition precedent to the validity of the notice to be thereafter issued, and that the omission to make such a demand would vitiate the foreclosure proceedings. But he contends that the allegation in the plaint that such demand was made is amply borne out by the evidence of the two witnesses whom plaintiff called to prove that fact. These persons (Kahl Singh and Gauri) depose to the effect that the mortgagee informed the mortgagor in their presence that unless the mortgage money was paid, a foreclosure notice would be issued. The learned counsel for the appellant contended that this evidence was utterly worthless, and asked me to reject their statements on various grounds. Kahl Singh, it is true, has once before given evidence on behalf of the plaintiff, but this fact alone hardly constitutes him, in the words of the learned counsel, a "standing witness" for the plaintiff, nor do I think that because he was once suspended from his official duties, he is no longer to be relied upon as a veracious witness. A more important objection to his evidence being regarded as satisfactory proof of a previous demand is that he stated when giving

⁽¹⁾ 24, P. R., 1895.

⁽²⁾ 84, P. R., 1890.

⁽³⁾ I. L. R., V ALL., 9.

⁽⁴⁾ 5, W. R., P. C., 47.

⁽⁵⁾ 185, P. R., 1889.

evidence in 1900 that the demand was made in *Har par sal*, that is to say, in *Har* last year, 1899, whereas the notice was issued in *Har* 1898. Mr. Lal Chand contended, in reply to this objection, that *par sal* meant year before last, *i. e.*, 1898, but I am unable to find any authority for such an interpretation of a common expression. At the same time, I do not attach much weight to the objection as it is obvious that the witness merely made a slip. He expressly states that at the time when the demand was made the mortgagee told the mortgagor that, unless the money was paid, a notice would issue, and it is clear from this that the demand was made previously to the issue of the notice. Against the other witness, Gauri, it is urged that on a previous occasion the plaintiff gave evidence on his behalf in a criminal case. This apparently was the case, but from this fact and from the fact that Kahl Singh had once before testified in plaintiff's favour, I can only deduce that these two men were friends of the plaintiff and as such very likely persons to be present with him on the occasion to which they now depose. On the whole, I am not disposed to treat this evidence as utterly false and incredible, the more especially as I can see no reason whatever for the omission on plaintiff's part to make the demand prior to taking action under the Regulation. Mr. Muhammad Shaffi suggested that it was a favourite trick on the part of money-lenders to issue notices under the Regulation without giving mortgagors a chance of paying up by making a previous demand for the mortgage money. I cannot, however, understand the object of this practice, as the notice itself is a demand to pay within one year and gives the debtor ample opportunity, if he so wishes, or possibly it would be better to say, if he is so able, to liquidate his liability and save his land. For these reasons I see no ground for holding that a demand was not made before the notice was issued.

It was then argued that, even if the evidence of the two witnesses is to be believed, there is no proof that a demand was made of the specific amount due under the terms of the mortgage-deed. The witnesses, no doubt, merely state that plaintiff said "Give me my money" or words to that effect, and do not allege that any definite sum was specified. It is obvious, however, from their evidence that the mortgagor could have had no doubt as to what money was intended as he was warned that, if he did not pay it, a notice of foreclosure was to be issued, and I can find no authority for the proposition that the

demand must distinctly specify the exact amount due. *Karan Singh v. Mohan Lal* ⁽¹⁾, upon which reliance was placed, does not lay down any such rule, the question whether a notice which requires payment of a larger amount than that actually due, is on the ground invalid, not having been decided in that case. On the other hand *Forbes v. Amir-un-nissa* ⁽²⁾ and *Wasawa Singh v. Rura* ⁽³⁾ are distinct authorities to the contrary.

(2). The notice issued under Regulation 17 of 1806 is defective and invalid for the following reasons :—

(a). It is headed “*Notis ba illat dafa 8, Regulation Satarah, 1880.*”

Section 8 of the Regulation makes no provision for the heading of a notice in any particular form, and though the words above set out are undoubtedly wrong and incorrectly describe the Regulation under which the notice was issued, I cannot but regard them as mere surplusage. It is immaterial, therefore, that the heading is erroneous.

(b). The notice is signed by Balwant Singh, the officer who issued the notice, but the official designation of that officer which is appended is not in Balwant Singh's own handwriting, whereas under Section 8, the Judge must notify “by a *parwana* “under his seal and official signature that if he shall not redeem,” &c. From these words the inference is, Mr. Muhammad Shaffi contends, that not only the name but the official designation of the officer must be written in the officer's own handwriting, and reference is made to *Ram Chand v. Ghulam Muhammad* ⁽⁴⁾ in support of the contention. In that case it was held that a notice which bore the signature of the Judge unaccompanied with his official designation was invalid. The learned Judges decided that the term “official signature appears to “us necessarily to mean that a signature appearing on the “face of it is to be made in an official capacity, and it is usually “the addition of the official title which distinguishes an “official from a private signature.” From these words it does not follow, in my opinion, that the learned Judges intended to rule that the official designation must also be in the handwriting of the Judge, provided his signature is accompanied with such designation, nor is there anything in the ruling of the Full Bench in *Sham Singh v. Karm* ⁽⁵⁾ against this view. In the last

⁽¹⁾ *I. L. R.*, V All., 9.

⁽²⁾ 5, *W. R.*, P. C., 47.

⁽³⁾ 24, *P. R.*, 1895, p. 96.

⁽⁴⁾ 84, *P. R.*, 1890.

⁽⁵⁾ 185, *P. R.*, 1889.

mentioned case it was held that a notice which bore the seal of the District Judge and not his signature but only some illegible initials without any official designation was materially defective, but the learned Judges expressly refrained from deciding "the general question whether a signature in initials "only but *perfectly legible* and leaving no doubt as to the name "they were intended to represent would be a fatal defect." Again in *Wasawa Singh v. Rura* ⁽¹⁾ it was held that a notice which was signed in his own name by the Judge was not defective merely because the words "District Judge" were impressed with a stamp. This is a direct authority upon the point and I have no hesitation in following it.

(c). *The property mortgaged is wrongly described in the notice, one of the khewat Nos. being given as 15 instead of 51.* Under Section 8 of the Regulation the Judge must "notify by a *parwana* "under his seal and official signature that if he shall not redeem "the property mortgaged in the manner," &c., and no provision is made that the property shall be specifically described. In the present case a description, which is by an obvious slip in one particular erroneous, was given of the mortgaged property, but had the description been altogether omitted, the validity of the notice would not have been effected thereby. Surely it is a *reductio ad absurdum* to argue that a slight inaccuracy in that which could perfectly well have been entirely left out is sufficient to invalidate the notice? I regard the description of the property as mere surplusage and the mistake therein as innocuous.

(3). *A copy of the application and the notice were not duly served upon the mortgagor.*

This objection is altogether untenable. The evidence of the peon (Mul Chand) and Tahawar clearly proves that service was duly effected, while the mortgagor's statements upon this point were most unsatisfactory. He cannot "remember" whether he received notice nor can he swear that the handwriting on the notice is not his. I have no hesitation in finding that service was duly effected upon him. The only question remaining for decision is whether the defendant, Wali Muhammad, was competent to effect a mortgage of the land which was joint of himself and of his brother. The learned counsel for appellant did not lay any very great stress upon this objection and in my opinion, very rightly so, nor did he refer me to any authority in support of the contention. On the other hand, Mr. Lal Chand stated, without demur from the other side, that

⁽¹⁾ 24, P. R., 1895.

Wali Muhammad has a power-of-attorney from his brother authorising him to mortgage the joint land. No issue was framed on the point in the first Court, nor was it referred to in the written cross-objections filed by defendant in the Divisional Court. Under these circumstances it is too late to raise the objection now, even if it were otherwise good and valid. In my opinion, however, there is no force whatever in it.

I have now disposed of all the points that were urged on behalf of appellant before me, and as a result I find, that I must decide against him in respect of each of them. I accordingly dismiss the appeal with costs.

Appeal dismissed.

No. 6.

Before Mr. Justice Chatterji.

LAKHMI NARAIN,—(DEFENDANT),—APPELLANT,

Versus

APPELLATE SIDE. }

TARA SINGH,—(PLAINTIFF),
CHARAN DAS AND OTHERS,— } —RESPONDENTS.
JUDGMENT-DEBTORS—(DEFENDANTS), }

Farther Appeal No. 574 of 1899.

Mortgage—Mortgage for valuable consideration—Intent to defeat and delay a particular creditor—Fraud.

On 17th June 1897, plaintiff sued the sons of L. M. for an unsecured debt, and on the same day applied for and obtained an order for attachment of property prior to judgment. On 18th the order on the defendants' objection was withdrawn, but a fresh one was again granted on the 19th. On 17th the defendants executed a mortgage-deed of all their property, movable and immovable, including outstanding debts in favour of the appellant. The plaintiff on getting his decree in the first Court immediately attached certain houses which were sold by auction, the appellant objected as mortgagee, and the houses were ordered to be sold subject to his mortgage.

The plaintiff then brought the present suit to set aside the above order, on the ground that the mortgage was fraudulent and made in order to defeat his claim, and was also subsequent to the issue of the prohibitory order.

The Courts below decreed the claim, holding that the mortgage was not *bona fide* and was effected with full knowledge of the plaintiff's suit and the issue of the prohibitory order, and was practically intended to deprive him of his right to realize his debt from L. M.'s estate, and although a good deal of the consideration-money was devoted to paying off other creditors of the deceased, it was void.

On further appeal to the Chief Court,

Held, that though the appellant intended to pay the consideration entered in the deed in full, and it was to be paid to creditors and not to the debtors, yet as he entered in his deed property over which he did not really mean to claim a lien and which he allowed to remain in the mortgagors' hands for their benefit and joined with the mortgagors in getting the deed executed in order to defeat and delay the plaintiff's realization of his debt, upon the authorities and under the rule of equity and good conscience it was void against the plaintiff.

Twyne's Case ⁽¹⁾, *Carlton v. Kennett* ⁽²⁾, *Worsley v. De Mattos* ⁽³⁾, *Holmes v. Peasey* ⁽⁴⁾, *Harman v. Richard* ⁽⁵⁾, *Bott v. Smith* ⁽⁶⁾, followed. *Abdul Hye v. Mir Muhammad Mozaffar Hossain* ⁽⁷⁾, *Copis v. Middleton* ⁽⁸⁾, *Golden v. Gillam* ⁽⁹⁾, *Joshua v. The Alliance Bank of India* ⁽¹⁰⁾, *Mussammatt Chand Kour v. Mussammatt Fajjo* ⁽¹¹⁾, referred to. *Wood v. Dixie* ⁽¹²⁾, *Darvill v. Terry* ⁽¹³⁾, *Rangilbhai Kalyandas v. Vinayak Vishnu* ⁽¹⁴⁾, *Moti Lal Ravichand v. Utam Jagjivan Das* ⁽¹⁵⁾, *Nana v. Routmal* ⁽¹⁶⁾, *Ishan Chunder Das Sarkar v. Bishu Sirdar* ⁽¹⁷⁾, *Narayana Pattar v. Viraraghavan Pattar* ⁽¹⁸⁾, *Lakha Mal v. Mula* ⁽¹⁹⁾, *Ram Burun Singh v. Jankee Sahoo* ⁽²⁰⁾, and *Seth Kastur Chand v. Mangal Sen* ⁽²¹⁾, distinguished.

Further appeal from the order of Major E. Inglis, Divisional Judge, Siolkot Division, dated 7th April 1899.

Lal Chand and Lajpat Rai, for appellant.

Ishwar Das, for respondents.

The judgment of the learned Judge was as follows:

CHATTERJI, J.—The material facts are sufficiently stated 11th Augt. 1900.
in the judgments of the Lower Courts. The plaintiff and others were creditors of one Ladh Mal, deceased, and the defendant Lakhmi Narain's father, Ram Narain, was also one of them. On 17th June 1897 the plaintiff sued the sons of Ladh Mal for Rs. 1,800, principal and interest, and on the same day applied for and obtained an order for attachment of property prior to judgment against the defendants. On the 18th the defendant objected, on which the order was withdrawn and a fresh one granted in plaintiff's favour on 19th June. But on 17th June the defendants had already executed a mortgage-deed for Rs. 5,000 of all their property, movable and immovable, including outstanding debts and all goods in

(1) 1 Smith's *Leading Cases*, 9th Ed., 1.

(2) *Cowp.*, 434.

(3) 1 *Burr.*, 474.

(4) 26 *L. J. Ch.*, 179.

(5) 22 *L. J. Ch.*, 1066.

(6) 21 *Beav.*, 511.

(7) *I. L. R.*, X *Calc.*, 616.

(8) 2 *Madd.*, 410.

(9) *L. R.*, 20 *Ch. Dn.*, 389.

(10) *I. L. R.*, XXII *Calc.*, 185.

(11) 113, *P. R.*, 1880.

(12) 7, *Q. B.*, 892.

(13) 30 *L. J. Ex.*, 355.

(14) *I. L. R.*, XI *Bom.*, 666.

(15) *I. L. R.*, XIII *Bom.*, 431.

(16) *I. L. R.*, XXII *Bom.*, 255.

(17) *I. L. R.*, XXIV *Calc.*, 825.

(18) *I. L. R.*, XXIII *Mad.*, 184.

(19) 21, *P. R.*, 1875.

(20) XXII *W. R.*, 473.

(21) 68, *P. R.*, 1895.

the shop of Billa, defendant, including brass, copper and iron vessels in favour of Lakhmi Narain. The consideration was received thus:—For expenses of registration Rs. 127-3-3; certain specified debts paid to creditors Rs. 3,369-12-9; Rs. 1,503 kept in deposit with the mortgagee to pay certain other creditors. The deed was produced for registration on 9th October, but the mortgagors did not agree, in consequence of which registration was refused by the Sub-Registrar, but finally ordered by the Registrar on 4th November.

The plaintiff ultimately got a decree for Rs. 2,055-12-6, including costs, on 24th November 1897, in the Court of the Divisional Judge.

Before that date, *i.e.*, soon after getting his decree in the first Court, plaintiff attached certain houses which were sold by auction on 6th November 1897. But on 4th November Lakhmi Narain put in his objection as mortgagee under the deed of 17th June which was finally accepted on 9th July 1898 by ordering the attached houses to be sold, subject to the mortgage.

The present suit is brought by plaintiff to set aside this order, on the ground that the mortgage was fraudulent and made in order to defeat his claim and was also subsequent to the issue of the prohibitory order.

The Courts below have decreed the claim holding that the mortgage was not *bonâ fide* and was effected with full knowledge of the plaintiff's suit and the issue of the prohibitory order, and was practically intended to deprive him of his right to realize his debt from Ladha Mal's estate, though a good deal of the consideration-money was devoted to paying off other creditors of the deceased. They also hold that some of the debts were over-stated in the deed, that there was no proper list or description of the outstandings and movable property mortgaged nor any possession given over the latter, all showing that the deed was executed in a hurry and pointing to the intention to defeat the plaintiff's claim.

Lakhmi Narain appeals urging that the debts were correctly stated in the deed, that there was no legal bar to the alienation even if the effect or object of it was to defeat the plaintiff's claim, and that the transfer to him is a mortgage and not a sale of Ladha Mal's property.

The lower Courts do not find that the sums stated to be due to Parmanand, Bhawani Shanker, Nanak Chand, Kirpa Ram and Thakar Das, Prab Dyal, Hemraj, Palamal and

Lakhmi Narain and others in the deed of mortgage were wholly fictitious, but simply that they were exaggerated, nor that the sums which, according to the evidence, the defendant Lakhmi Narain paid to certain of the creditors were not actually paid. As regards Parmanand, it is urged for appellant that he was called as a witness by the plaintiff and was given up and this is the case. I do not think it can be at all held that his debt is not correctly entered in the deed. As regards the others the alleged exaggerations are explained by the creditors on oath, and I do not think that any presumption of conscious bad faith can be drawn against the defendant-appellant even if the over-statements are proved which they cannot be said to be. We are only concerned with the good faith of the alienee and not of the alienor, and in the absence of positive evidence expressly or by reasonable implication establishing the fact. I consider it unsafe to hold that Lakhmi Narain, appellant, conspired with the mortgagors to over-state the amounts of the debts in order that the debtors might derive some advantage therefrom. *Prima facie* these debts must be held to have been actually due at the time of the deed.

As regards the outstandings hypothecated by the deed the bonds due to the debtors have simply been mentioned, but not the sums actually due from the obligors, nor were shop goods and property valued in the deed. The first Court is right in saying that this is unsatisfactory procedure as respects the mortgagee, as the amounts payable by the obligors might be less. The security may be ample for the mortgagee without including the outstandings, but it either shows that the deed was executed in a great hurry, or that there was some ulterior reason for the mortgagors making over all their property to the mortgagee. If the mortgagee had been including these bonds in his own interests he would have taken more care to ascertain the debts.

This remark applies with greater force to the movable property in the mortgagors' shop and their pots and pans which have been included in the mortgage. They are not specified in the deed, but are said to be entered in a separate list. Lakhmi Narain was unable to produce this list and said he had lost it, which is a very unlikely story. He admittedly never had possession of these articles which remained with the debtors as before. He is said to have instituted criminal proceedings under Section 406, Indian Penal Code, against the debtors, but this was probably a mere make-believe as it is not clear how he could succeed without a list certified or signed by the

debtors. A general bill of sale of all the debtors' goods when possession is not transferred is frequently a suspicious transaction and the cover for a fraud upon the creditors. The case is more so when the deed is executed in a great hurry, and there is no list prepared and made over to the purchaser nor any valuation made. A mortgage of this character stands practically on the same footing, while the hypothecation of all the debtors' shop goods, such as metal vessels, is a somewhat unusual proceeding which only increases the suspicion against the object of the deed.

It is proved beyond doubt that there was a meeting of the creditors or the bulk of them immediately before the plaintiff's suit was filed. It was proposed that they should all take the principal amount due to each and forego the interest. Lakhmi Narain's father was a creditor and Lakhmi Narain himself was present. All the creditors are said to have agreed except the plaintiff who refused. He left the meeting and immediately brought his suit and applied for attachment prior to decree. That very day this mortgage-deed was executed. The whole circumstances inevitably lead to the conclusion that the deed was executed in order to prevent plaintiff from recovering his debt by process of execution. This at once explains why the deed was written in such a hurry that many of its details were incomplete, why all the goods of the debtors and their movable property were pledged without valuation and without possession being made over, or a list prepared, and why plaintiff applied for an attachment before judgment the moment he filed his suit. That the debtors afterwards refused to register the deed is of small moment. They may have thought that they had not made a prudent bargain in putting themselves so much in the appellant's power, but their attempt to draw back was too late and failed. It is also worthy of note that Charn Das, defendant, said in his application to set aside the first order of attachment that he had jewels worth Rs. 20,000, and that this statement was false. Of course Lakhmi Narain is not directly responsible for his falsehood, but it is a piece of circumstantial evidence which throws some light on the object of the transaction impugned by the plaintiffs. There can be no doubt that the debtor's object was fraudulent at least as respects the plaintiff, and it is impossible to believe that Lakhmi Narain who was fully aware of all the facts and must have known the result of the mortgage on the plaintiff's prospects of realizing his debt was ignorant of the motive of the debtors.

The Lower Courts may have been wrong on the evidence in holding the amounts of the debts entered in the deed to have been exaggerated, but they are presumably right in their view as regards the mortgage of outstandings and clearly so as regards the goods and movable property of the debtors. From the peculiar features of the deed and the attendant circumstances they drew the inference that the deed was not written in good faith, and as explained above, I am not prepared to come to a different finding.

I hold then that though Lakhmi Narain meant to pay the consideration entered in the deed in full, he entered in his deed property over which he did not really mean to claim a lien and which he allowed to remain in the mortgagors' hands for their benefit, and that he joined with the mortgagors in getting the deed executed in order to defeat the claim of the plaintiff.

It is a nice question of law how far such a deed is valid as against the plaintiff. The deed is valid as against the transferors and probably good as against the whole world, but as its intention was to defeat the claim of the plaintiff then about to sue it cannot be said to have been executed in good faith as far as he is concerned. It is not a deed for the payment of all the creditors of the mortgagors. Certain debts are specified in it, but though plaintiff was actually present at the meeting of creditors at which certain terms were proposed to them and was pressing for immediate settlement of his claims, his name was omitted, although others were entered who had not realized their debt from Lakhmi Narain even at the date of his examination in Court after the intention of this suit. The inclusion of all the property of the debtors and the fact that possession was not taken of some of the movable property nor meant to be taken is a further proof of bad faith.

The Indian Law on the subject of fraudulent transfers is comprehensively given in Section 53 of the Transfer of Property Act, 1882, which enacts that "every transfer of immovable property made with intent * * * * to defeat or delay the creditors of the transferor is voidable at the option of any person so defrauded, defeated or delayed." This section deals with immovable property alone, but the same principles apply to the case of other property and immovable property was included in the present deed. The Act is not in force in the Punjab, but the principles it embodies are founded on equity and justice and are of universal application throughout India. The section reproduces some of the provisions of two English Statutes—13 Elizabeth. C. 5 and 27 Elizabeth. C. 4,

repealed by the Act, but those Statutes have been declared to be in affirmance of the Common Law of England and the principles on which they proceed are binding in this Province as elsewhere. Pollock on the *Law of Fraud in British India*, pages 81 and 82. This view has the support of their Lordships of the Privy Council, *Abdul Hye v. Mir Muhammad Mozaffar Hossein* ⁽¹⁾ at page 625. English cases on the Statutes and Indian cases on Section 53 of the Transfer of Property Act can therefore be legitimately considered in order to see their effect upon the question before me. The cases are numerous and deal with different forms of fraudulent conveyances, and I do not propose to enter into an exhaustive discussion of them. It is obvious that the decision in a particular case must to a great extent depend upon the facts of that case. I shall notice only a few of the more important authorities which appear to me to be of use as guides to a correct decision in the present instance. The point I have to decide is whether a transfer, in this case a mortgage, for valuable consideration in which both the mortgagor and mortgagee have it, as one of the objects in view in getting the deed executed, to defeat and delay a particular creditor, is good as against such creditor.

The English cases are, I think, unanimous that the mere existence of consideration is not sufficient to take the conveyance out of the operation of the Statutes. *Twyne's case* ⁽²⁾ is an instance in point. *Twyne* had to recover a true debt from the grantor *Pierce*, but the secrecy of the transfer and the non-delivery of possession was held to vitiate it. It was held to be no transfer at all, but merely a shield to protect the property of *Pierce*, who, in spite of the grant, continued to be the owner, from the attachment by other creditors. The case is not exactly apposite here as the mortgage to *Lakhmi Narain* was intended to take effect as a transfer in his favour except as to certain property comprised in the deed.

The result of the English decisions is thus summed up in *Story's Equity Jurisprudence*, 2nd English Edition, Section 369. " * * * A conveyance, even if for a valuable consideration, is not, under the Statute of the 13 Eliz., valid " in point of law from that circumstance alone. It must also " be *bonâ fide*, for if it be made with intent to defraud or defeat " creditors, it will be void, although there may, in the strictest " sense, be a valuable, nay, an adequate consideration. This " doctrine was laid down in *Twyne's case*, and it has ever since

(1) *I. L. R.*, X Cal., 616.

(2) *Smith's Leading Cases*, 9th Ed., 1.

“been steadily adhered to. Cases have repeatedly been decided, in which persons have given a full and fair price for goods, and where the possession has been actually changed; yet being done for the purpose of defeating creditors, the transaction has been held fraudulent, and therefore set aside. Thus, where a person, with full knowledge of a decree against the defendant, bought the house and goods belonging to him, and gave a full price for them, the Court said, that the purchase, being with a manifest view to defeat the creditor, was fraudulent, and, notwithstanding the valuable consideration, void. So if a man should know of a judgment and execution, and, with a view to defeat it, should purchase the debtor's goods, it would be void; because the purpose is iniquitous.”

In Kerr on *Fraud*, 2nd Edition, page 193, the rule is similarly laid down.

The leading cases upon which the above statement of the law is based are *Cadogan v. Kennett* ⁽¹⁾, *Worsley v. De Mattos* ⁽²⁾, *Holmes v. Penney* ⁽³⁾, *Harman v. Richards* ⁽⁴⁾, *Bott v. Smith* ⁽⁵⁾.

The principle underlying these cases is that good consideration alone is not sufficient, and that the deed must be executed in good faith in order to avail against creditors whose remedies are affected by the conveyance. The words good faith are not defined, but it does not require authority to show that an intention to defeat or delay creditors is opposed to good faith, and a conveyance whose object is to deprive creditors of their right to recover their dues from their debtors' property or to obstruct them in doing so is void as against them.

The mere knowledge that a suit is pending or a decree is about to be executed is not necessarily conclusive proof of an intention to defraud on the part of the transferee even though that may be the debtor's sole object. *Wood v. Dixie* ⁽⁶⁾ seems to lay down broadly that a sale of property for good consideration is not void merely because it is made with intent to defeat the expected execution of a judgment-creditor, but Lord Chief Justice Denman uses the word *bonâ fide* also in connection with the conveyance. It was followed in *Darvill v. Terry* ⁽⁷⁾. But the facts of these cases do not appear to show fraud on the part of the transferees. In the first case money was owing to the purchaser who had advanced it previously to the seller Phillips,

⁽¹⁾ *Cowp.*, 434.

⁽⁴⁾ 22, *L. J. Ch.*, 1066.

⁽²⁾ 1 *Burr.*, 474, 475.

⁽³⁾ 21, *Beav.*, 511.

⁽³⁾ 26, *L. J. Ch.*, 179.

⁽⁶⁾ 7, *Q. B.*, 892.

⁽⁷⁾ 30, *L. J.*, *Ex.* 355.

to relieve him from an execution at the suit of one Norton. Afterwards Phillips being unable to pay, executed the conveyance to the plaintiff, and another creditor took out execution against the seller on the very day the valuation was completed. Here it is clear to me that creditor was seeking to recover his money which was unsecured, and the knowledge that execution was about to issue would naturally make him more anxious to get a conveyance before execution was taken out. He doubtless intended to defeat the execution-creditor in favour of his own debt, but this was legitimate and involved no fraud upon the creditors' rights. In the second case money was *bonâ fide* lent to the debtor. The Statute (13 Eliz., C. 5) is not meant to "restrain honest dealings and transactions between man and man" as was pointed out by Sir Thomas Plumer, Vice-Chancellor, in *Copis v. Middleton* ⁽¹⁾, and by Lord Justice Fry in *Golden v. Gillam* ⁽²⁾.

Turning now to the Indian authorities, for the English cases have only an indirect bearing on the question before me, I think the above principles have on the whole been steadily accepted and followed in this country. *Rangilbhai Kalyandas, &c., v. Vinayak Visnu and another* ⁽³⁾, quoted for the respondents, has only a remote bearing on the present case. The doctrine of the Statute was followed and the sale was set aside on various grounds, most of which are foreign to the present case and need not therefore be considered. *Motilal Ravichand v. Utam Jagjivandas* ⁽⁴⁾ professes to follow the same principles, and the sale in dispute, which was in consideration of an existing debt which the creditor was pressing the seller to pay, was upheld. The case seems to fall under the rule laid down in *Wood v. Dixie* ⁽⁵⁾. In *Nana v. Routmal* ⁽⁶⁾ the sale was set aside as fraudulent on grounds similar to those of *Rangilbhai's* case. *Joshua v. The Alliance Bank of Simla* ⁽⁷⁾ was a case under Section 53 of the Transfer of Property Act, and the transfer was set aside as against the creditor. In *Ishan Chunder Das Sarkar v. Bishu Sirdar, &c.* ⁽⁸⁾, it is pointed that knowledge of an impending execution does not vitiate a transfer for value and though the transferor may intend to defeat the execution-creditor, the transferee may believe that the money is intended for the payment of creditors. But it very pertinently observes that "it would be almost a contradiction to say "that a transferee for value, who takes the transfer with the

(1) 2 *Madd.*, 410.

(2) *L. R.*, 20 *Ch. Dn.*, 389.

(3) *I. L. R.*, XI *Bom.*, 666.

(4) *I. L. R.*, XIII *Bom.*, 434.

(5) 7, *Q. B.*, 892.

(6) *I. L. R.*, XXII *Bom.*, 255.

(7) *I. L. R.*, XXII *Calc.*, 185.

(8) *I. L. R.*, XXIV *Calc.*, 825.

“intention of helping the transferor to convert his immovable property into money, which can be easily concealed and thus to defeat or delay his creditors, should nevertheless be treated as a transferee in good faith, and the transfer to him upheld, though Section 53 says that a transfer made with such intention is voidable at the option of the creditors.” It takes practically the same view as I do of *Wood v. Dixie* ⁽¹⁾. Another fact pointed out in the judgment is that Section 53 of the Transfer of Property Act goes further than the English Statute, so that if the principles of the section apply to the Punjab greater strictness would be required in the matter of good faith. See also *Narayana Pattar v. Viraraghavan Pattar* ⁽²⁾. I do not think it necessary to refer to the earlier cases which more or less lay down the same principles.

In this Province the cases bearing on the point are few. In *Lakha Mul v. Mul, &c.* ⁽³⁾, quoted for the appellant, it was held that a judgment-debtor is at liberty to sell his property at any time before seizure or until it is in *custodia legis*, although his intent may be to defeat or delay the judgment-creditor, and that such alienation can only be vitiated by proof that there was really no sale, and that the object of the transaction was to put the property in a state of concealment. This is a case before the passing of the Transfer of Property Act which embodied the rule applicable to such transfers previously prevailing authoritatively for those parts of India to which it extends. The first proposition embodied in the head-note appears to be unexceptionable. It is identical with that laid down (*Ram Barun Singh v. Jankee Sahoo* ⁽⁴⁾), where the effect of knowledge on the part of the purchaser is also correctly and cautiously expressed. The rule enunciated in regard to what constitutes a fraudulent transfer as respects the creditors in the judgment is also correct, but in my opinion as far as it goes is incomplete in that it does not refer to cases where consideration has passed, but the object is to help the judgment-debtor to conceal his property in order to defeat or delay his creditors. On the other hand, in *Mussammat Chand Kour v. Mussammat Fajjo* ⁽⁵⁾, Mr. Justice Brandreth expressed views, with reference to transfers which are effected for such an object similar to those above enunciated. See page 283. *Seth Kastur Chand v. Mangal Sen, &c.* ⁽⁶⁾, cited for the appellant, relates to a wholly different point, and has no application.

(1) 7, Q. R., 892.

(2) I. L. R., XXIII Mad., 181.

(3) 21, P. R., 1875.

(4) XXII, W. R., 473.

(5) 113, P. R., 1880.

(6) 68, P. R., 1895.

I have already found on the facts that the consideration stated in the deed of mortgage was intended to pass, and was not fictitious, and that it was to be paid to creditors and not to the debtors. So far this case is distinguishable from most of the cases cited above. I have also found that the mortgagors intended to defeat the plaintiff's claim as he had not agreed to forego interest, and that Lakhmi Narain was fully cognizant of this, and further that he also joined in the transaction to help the mortgagors to attain their object. His father was also a previous creditor, and had the deed been executed for a portion of the property for the sum due to him it would have been good even if it was known or intended to have the effect of depriving other creditors *pro tanto*. It is perfectly legitimate, apart from cases falling under the provisions of the Bankruptcy Law, for a man to do his best to recover his own money even though such recovery would deprive other creditors. But here he took a mortgage of the whole property and advanced other money with intent to defeat the plaintiff's claim. Even this alone would perhaps have not avoided his deed as his act did not enable debtors to convert their assets into cash for concealment, but was intended for the benefit of certain other creditors; at least his good faith would have been arguable on such a ground. But Lakhmi Narain went further. He got property not intended to be handed over to him as security for his advance, but to be retained by the judgment-debtors for their benefit, included in his deed, the hurry and incompleteness of which in certain details shows his purpose clearly.

I hold therefore that as *quoad* such property the effect of the deed is to defeat and delay the plaintiff's realization of his debt, and as this was the object of the transfer the deed is void as against the plaintiff upon the authorities and, in any case, under the rule of equity and good conscience.

The appeal is dismissed with costs.

Appeal dismissed.

No. 7.

Before Mr. Justice Chatterji.

REVISION SIDE. {

SUDHU SINGH,—(PLAINTIFF),—PETITIONER,

Versus

LEHNA SINGH AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Civil Revision No. 1581 of 1899.

Contribution, suit for—Joint wrong-doers—Decree for damages—Suit not maintainable.

H. S. and others brought a suit against the plaintiff and defendants in the present suit for possession of a plot of land, damages for demolition of a wall, and removal of building materials. In that suit the parties to the present dispute denied H. S.'s title and the other allegations in his plaint, but the suit was decreed with costs and Rs. 50 damages, the whole of which were realized from the plaintiff who brought the present suit for contribution against his former co-defendants. The Lower Court found that as the plaintiff and defendants know perfectly well that they were both acting wrongfully and had filed a false defence in the former suit, disallowed the present claim.

Held that the suit for contribution was not maintainable, the parties being joint wrong-doers in the common sense of the word as well as in law. *Haramoni Dassi v. Hari Churn Chowdhry* (1), *Gobind Chunder Nundy v. Srigobindh Chowdhry* (2), *Vayangara Vadaka Vittal Manja v. Pariyangot Padingara Kuruppoth Kudugochen Nayar* (3), *Fakire v. Tasadduq Husain* (4), followed. *Sreeputty Roy v. Loharam Roy* (5), referred to, and *Ruthu Sirdar v. Shujoo Parawarink* (6), distinguished.

Petition for revision of the order of Captain R. C. S. Macausland, Judge, Small Cause Court, Feroz-pore Cantonment, dated 19th July 1899.

Shelverton, for petitioner.

K. C. Chatterji, for respondents.

The judgment of the learned Judge was as follows :

CHATTERJI, J.—In this case the parties were sued in 1895 6th Augt. 1900. by one Harnam Singh and certain other persons for possession of a plot of land and for damages for demolition of a wall and removal of building materials. In reply they denied the then plaintiffs' title and the other allegations in the plaint. The Court finally gave a decree for possession and Rs. 50 damages and costs against them in favour of the plaintiffs.

The present plaintiff, Sudbu Singh, has now sued his former co-defendants in the Small Cause Court of Ferozepore Cantonment for contribution, alleging that the former plaintiffs have realized the whole cash decree from him. The defendants plead *inter alia* that as between joint tort-feasors a suit for contribution does not lie. The Judge has dismissed the suit on this ground and the present application is to revise his order.

On the first ground, *viz.*, the jurisdiction of the Small Cause Court to entertain the claim, it is urged that though the money was realized from the plaintiff within the local limits of the Court's jurisdiction by attachment of money lying in deposit in another Court, yet the whole cause of action did

(1) I. L. R., XXII Cal., 833.

(2) I. L. R., XXIV Cal., 330.

(3) I. L. R., VII Mad., 89.

(4) I. L. R., XIX All., 462.

(5) VII W. R., 384.

(6) XX W. R., 235.

not arise within those limits. I consider, however, that Section 17 of the Code of Civil Procedure which applies to Small Cause Courts has done away with all the learning about the whole cause of action being necessary to confer jurisdiction. Explanation III to that section shows this clearly, and it has been held in other cases that the use of the expression cause of action is not uniform throughout the Code, see *Haramoni Dassi v. Hari Churn Chowdhry* (1), at pages 840, 841. I hold that there is nothing to show that the whole cause of action is meant in Section 17 and overrule the objection which appears not to have been taken in the Lower Court.

As regards the second objection I have heard a long argument from the parties' counsel. The law relating to right of contribution among joint tort-feasors is best summed up by Pollock in his work on *Torts*, 5th Edition, p. 192, thus: "In short "the proposition that there is no contribution between wrong-doers must be understood to effect only those who are wrong-doers in the common sense of the word as well as in law. "The wrong must be so manifest that the person doing it could "not at the time reasonably suppose that he was acting under "lawful authority. Or to put it summarily, a wrong-doer by "misadventure is entitled to indemnity from any person under "whose apparent authority he acted in good faith; a wilful or "negligent wrong-doer has no claim to contribution or indemnity." These principles have been applied by the Judge in the present case. He holds that the parties "knew perfectly well "that they were acting wrongfully at the time. They no "doubt raised false pleas in the original suit * * * * and "they have already been east in damages for their action."

This is an application for revision, and I have to see whether there is any material error in this finding. Counsel for the applicant contends that the finding in the former suit was taken as conclusive by the Judge below, and that this was wrong as the parties were co-defendants ranged on the same side in the contest then before the Court. I do not see, however, that the Court has simply proceeded on the previous judgment. On the contrary evidence has been taken in this case which shows that the parties broke down the walls of the then plaintiffs and removed beams and other building materials. Plaintiff himself admitted the removal when he stated in the Lower Court, "God only knows who took away the building materials." Plaintiff also admitted, having filed the former

(1) *I. L. R.*, XXII Cal., 833.

jawabdarwa which contained false averments as to plaintiff's title, possession and erections thereon.

I think the breaking down of a standing wall even of a person who is only a joint owner of the land with the demolisher and the removal of building materials are wrongs in the ordinary sense of the term and not merely in law. The former is an act of flagrant high-handedness and the latter is very akin to theft if not theft actually. It was proved before and is in evidence now that the pulling down of the wall was at night which presumably showed that the parties well knew the wrongful nature of their act. A mere dispossession in assertion of the common right of ownership of the land might have stood on a different footing (*Ruthee Sirdar v. Shujoo Paramanick*) ⁽¹⁾. But the facts here were different and showed the acts of the parties to fall under the definition of wrong given by Pollock. The Judge holds this view and considers them to have acted with full consciousness of their wrong-doing. I am unable to interfere with his finding. The facts do not square with the case of *Sreeputty Roy v. Loharam Roy* ⁽²⁾. As regards the false defence filed in the former suit and the combination among the parties to defeat the then plaintiffs' claim, I think the case falls within the purview of *Gobind Chunder Nundy v. Srigobind Chowdhry* ⁽³⁾. See also *Vayangara Vadakarittil Maya v. Pariyangot Padingara Karuppath Kadugochen* ⁽⁴⁾, *Eakire, &c., v. Tasadduq Husain* ⁽⁵⁾.

I do not think therefore that any grounds have been made out for my interference on the revision side.

The application is dismissed with costs. Pleader's fees Rs. 10.

Application dismissed.

No. 8.

Before Mr. Justice Clark, Chief Judge.

GUR SAHAI,—(DEFENDANT),—APPELLANT,

Versus

KARAM CHAND,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Further Appeal No. 1450 of 1898.

Injunction—Jajman and Acharaj—Realization of virt from Jajmans.

In a suit for a permanent injunction to restrain defendant from receiving virt from the Jajmans on the ground that except the family of plaintiff no one within a certain area had any right to recover the same.

⁽¹⁾ XX, W. R., 235.

⁽³⁾ I. L. R., XXIV Calc., 320.

⁽²⁾ VII W. R., 384 (F. B.).

⁽⁴⁾ I. L. R., VII Mad., 89.

⁽⁵⁾ I. L. R., XIX All., 462.

Held, that the property in *virt* being of uncertain and indefinite character depending on the good-will of the *Jajman*, the latter being at liberty to prefer another *Acharaj*, injunction to restrain other persons from acting as *Acharaj* would amount to trenching unduly on the rights of the *Jajmans* to employ whatever priest they chose.

Ram Rattan v. Gori ⁽¹⁾, *Gobind v. Sadda* ⁽²⁾, *Mathra v. Kanhya* ⁽³⁾, and *Raja and another v. Krishna Bhat* ⁽⁴⁾ referred to.

Further appeal from the order of F. Field, Esquire, Divisional Judge, Peshawar Division, dated 25th July 1898.

Ishwar Das, for appellant.

Lal Chand, for respondent.

The judgment of the learned Chief Judge was as follows :

14th Augt. 1900.

CLARK, C. J.—Plaintiff sues for a permanent injunction to restrain defendant from recovering *virt* from the *Jajmans* of Tapa Daudzai where the parties reside.

The plaint recites that plaintiff's father died twenty-two years ago when plaintiff was two years old, after his death one Sobha Ram was appointed by plaintiff's mother to recover the *virt*. After him defendant's father was appointed, on whose death defendant took the place. All these paid the *virt* to plaintiff's mother, but defendant since 2½ years has not done so.

That except the family of plaintiff no one in the Tappa Daudzai has any right to recover *virt*.

Defendant pleaded that plaintiff's father and defendant's father have been taking *virt* in equal shares and are equally entitled, and that the *Jajmans* can pay whom they please.

The Courts have found that defendant and his father were put in as agents of plaintiff, and that defendant has not been realizing *virt* on a personal right, and have given a decree that defendant should be restrained from demanding *virt* in the Doaba Daudzai *ilaka* by the issue of a perpetual injunction.

Defendant has appealed and his first ground of appeal is that the suit for an injunction does not lie as defendant cannot be restrained from recovering fees from persons who choose to employ him.

It may be taken as settled law that *virt* is an assignable and inheritable property, and it may be the subject of contract, ancestral right, or customary proceeding. *Ram Rattan v. Gori* ⁽¹⁾. This is between the participators in the right of taking *virt*.

⁽¹⁾ 38, P. R., 1872.

⁽²⁾ 7, P. R., 1877.

⁽³⁾ 119, P. R., 1879.

⁽⁴⁾ I. L. R., III Bom., 232.

As between the *Acharajs* and the *Jajmans* there is no property the relation is purely voluntary and the *Jajmans* can employ whatever *Acharaj* they choose.

In *Gobind v. Saida* ⁽¹⁾ Sir M. Plowden stated: "The office of *Prohit* was hereditary as amongst his successors and descendants and gave the heir the right to share in the emolument of the office, but the relation of *Prohit* and *Jajman* was voluntary, the latter being at liberty to pay his fees to the priest of his own choice, and the *Prohit* being entitled to exercise his office in his individual capacity and to retain the fees paid to him in that capacity as his own, in what capacity a particular fee was received being a matter of evidence in each instance."

In *Mathra v. Kanhya* ⁽²⁾ it was held that a *Jajman* could if he so wished exclude any member of a family of priests from a share in *virt* paid by him.

Under these circumstances it seems to me that to restrain defendants from acting as *Acharaj* in Tappa Daudzai, for that is what the decree practically amounts to, is trenching unduly on the rights of the *Jajmans* to employ whatever priest they like.

In this connection *Raja and another v. Krishna Bhat* ⁽³⁾ may be consulted where a similar view was taken.

This suit is based upon the principle that plaintiffs' property has been infringed, it is not based on any contract on defendant's part not to realize *virt* nor on any implied contract when he was appointed agent that he should not after the determination of his agency continue to realize *virt*. Now the property in *virt* is of an uncertain and indefinite character; it depends on the good-will of the *Jajmans*, and if the *Jajman* prefers another *Acharaj* the property has ceased to exist.

I am unable to see any valid reason why defendant should not establish himself with the *Jajmans* as their *Acharaj* by personal election on their part.

A somewhat similar case may be put. If a doctor made over his practice to a substitute for a term in the absence of contract to the contrary, there would be nothing to prevent the substitute from keeping on his patients after the return of the doctor, if the patients desired to employ the substitute in preference to the doctor.

(1) 7, P. R., 1877.

(2) 119, P. R., 1879.

(3) I. L. R., III Bom., 232.

If defendant is entitled to be entertained as *Acharaj* he is entitled to demand *virt*, so the decree is equivalent to restraining him from acting as *Acharaj*.

No doubt defendant is not entitled to act as *Acharaj* except when specially selected, he is not entitled to act as *Acharaj* simply in "virtue" of his having been introduced into the district by plaintiff, as his agent, and I think the decree should be amended accordingly.

This was the only point argued before me. I accept the appeal so far as to modify the decree and give an injunction restraining defendant from acting as *Acharaj* and receiving *virt* except where he is personally chosen by the *Jajmans* to act as *Acharaj*.

Parties will bear their own costs of this appeal.

Appeal allowed.

Full Bench.

No. 9.

*Before Mr. Justice Clark, Chief Judge, Mr. Justice Reid
and Mr. Justice Chatterji.*

KHAN BAHADAR NAWABZADA SHAMSHERE ALI
KHAN,—(DEFENDANT),—APPELLANT,

Versus

MUSSAMMAT AHMAD ALLAHDI BEGAM—(PLAINTIFF),
—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No 395 of 1898.

Execution of decree—Power of Court to execute decree in excess of the limits of its pecuniary jurisdiction as an original Court—Civil Procedure Code, 1882, Sections 6, 25, 223 and 647—Punjab Courts Act, 1884, Section 35.

Held that a Court to which a decree has been sent for execution has not jurisdiction to execute such decree when it is in excess of the limits of its pecuniary jurisdiction as an original Court.

Gopal Das v. Mussammat Golab Devi ⁽¹⁾, *Ram Lal v. Natha Singh* ⁽²⁾, *Ganga Ram v. Gursarn Das* ⁽³⁾, *Narasayya v. Venkata Krishnayya* ⁽⁴⁾, and *Shanmuga Pillai v. Ramanathan Chetti* ⁽⁵⁾ referred to. *Shri Sidheshwar Pandit v. Shri Harihar Pandit* ⁽⁶⁾, *Gokal Kristo Chunder v. Aukhil Chunder* ⁽⁷⁾, and *Durga Charan Mojumdar v. Umatara* ⁽⁸⁾ followed.

Miscellaneous first appeal from the order of R. P. Warburton, Esquire, Munsif, 1st Class, Karnal, dated 21st December 1897.

Shelverton and Oertel, for appellant.

Shah Din, for respondent.

The question of law involved in the case was referred to a Full Bench by the following order of the Divisional Bench (*Clark, C. J., and Chatterji, J.*) :—

CLARK, C. J.—The original decree in this case was for Rs. 15,000; it was sent for execution to Mr. Warburton, Munsif, 1st class. Certain properties were attached and Khan Bahadar Shamsher Ali Khan objected to the attachment. Mr. Warburton disallowed the objection, and Shamsher Ali Khan has appealed to this Court. 8th June 1900.

The first question that arises is whether the appeal lies to this Court or to the Court of the Divisional Judge. Following this Court's judgment No. 716 of 1898, we hold that the appeal lies to the Divisional Judge.

⁽¹⁾ 70, P. R., 1897.

⁽²⁾ 45, P. R., 1882.

⁽³⁾ 31, P. R., 1887.

⁽⁴⁾ I. L. R., VII Mad., 397.

⁽⁵⁾ I. L. R., XVII Mad., 309.

⁽⁶⁾ I. L. R., XII Bom., 155.

⁽⁷⁾ I. L. R., XVI Calc., 457.

⁽⁸⁾ I. L. R., XVI Calc., 465.

However as certain difficult questions arise which the Divisional Judge could not entertain, being bound by decisions of this Court, we with the consent of parties transfer the appeal to this Court.

The first question that now arises is whether Mr. Warburton had jurisdiction to hear the case.

This is a question which is frequently arising, and we think it is desirable to have the question set at rest by a reference to a Full Bench.

The question is discussed in *Gopal Das v. Mussammat Golab Devi* ⁽¹⁾ and again No. 716 of 1898, the authorities for and against are quoted in the latter judgment.

We refer the following question for decision to a Full Bench.

Has a Court to which a decree has been sent for execution jurisdiction to execute such decree when it is in excess of the limits of its pecuniary jurisdiction as an original Court.

The judgment of the Full Bench was delivered by

24th Nov. 1900.

CLARK, C. J.—The question for decision is stated in the order referring the case to a Full Bench.

The main authorities in favour of the Court executing the decree not being bound by the limits of its pecuniary jurisdiction in a suit are *Ram Lal v. Natha Singh* ⁽²⁾, *Ganga Ram v. Gursarn Das* ⁽³⁾, *Narasayya v. Venkata Krishnayya* ⁽⁴⁾, and *Shanmuga Pillai v. Ramanathan Chetti* ⁽⁵⁾.

The main authorities for the opposite view are *Shri Sidheshwar Pandit v. Shri Harihar Pandit* ⁽⁶⁾, *Gokal Kristo Chunder v. Aukhil Chunder* ⁽⁷⁾, and *Durga Charan Mojumdar v. Umatara* ⁽⁸⁾.

As regards the judgments of this Court, the first judgment was to the effect that there was nothing in the Punjab Courts Act then in force (Section 34, Act XVII of 1877) or in Section 223, Civil Procedure Code, disabling a Court from executing a decree in excess of the limits of its pecuniary jurisdiction in a suit.

When the second judgment was passed a new Punjab Courts Act, Act XVIII of 1884, had been passed, and Section 34 of the old Act was materially altered by Section 35 of the new Act, and the question referred was whether "Since Act XVIII of 1884 "came into operation, can a Court in execution pass order in

⁽¹⁾ 70, P. R., 1897.

⁽²⁾ 45, P. R., 1882.

⁽³⁾ 31, P. R., 1887.

⁽⁴⁾ I. L. R., VII Mad., 397.

⁽⁵⁾ I. L. R., XVII Mad., 309.

⁽⁶⁾ I. L. R., XII Bom., 155.

⁽⁷⁾ I. L. R., XVI Cal., 457.

⁽⁸⁾ I. L. R., XVI Cal., 465.

“regard to property in excess of its pecuniary jurisdiction as a Court of original jurisdiction.”

The decision of the Full Bench was a brief one delivered by Sir Meredyth Plowden and decided that as “Act XVIII of 1884” does not expressly deal with the jurisdiction of the Court in the “matter of execution business we have to fall back on the Civil Procedure Code, and Section 223 of this Code shows that there is “no limitation on the powers of an original Court to execute decrees “of any value.”

We agree with the view that we have to fall back on the Civil Procedure Code for the decision of the question, but are unable to agree with the interpretation put upon Section 223, Civil Procedure Code.

There was not in that judgment any detailed discussion of the various sections of the Civil Procedure Code applicable; Section 6 was not referred to.

At that time the Calcutta judgment had not been passed, and Section 647 had not been amended by Act VI of 1892.

We now proceed to consider whether Section 223, Civil Procedure Code, gives jurisdiction in execution proceedings to any Court without regard to its pecuniary jurisdiction.

The wording of the section of which a main part is “The Court which passed a decree may of its own motion send it for execution to any Court subordinate thereto” is wide enough to include *any* Court without reference to its pecuniary jurisdiction, but the question is whether Section 223 is governed by Section 6, which runs “Nothing in this Code shall operate to give any Court jurisdiction over suits of which the amount or value of the subject matter exceeds the pecuniary limits (if any) of its ordinary jurisdiction.”

If the word “suits” include execution proceedings then Section 223 is certainly governed by Section 6. Whether execution proceedings form part of the “suit” is elaborately discussed in *Gokal Kristo Chunder v. Aukhil Chunder Chatterjee* (1). We agree in the arguments used in that judgment and the conclusion arrived at that execution proceedings form part of the suit.

It is unnecessary for us to recapitulate the arguments used in that judgment, but we may add one which could not have been used in that judgment which was passed in 1889.

When Section 647 of the Civil Procedure Code was amended by Section 4, Act VI of 1892, the following explanation was added

(1) *I. L. R.*, XVI *Cal.*, 457.

“this section does not apply to application for the execution of “decrees which are proceedings in suit.”

This is a distinct declaration on the subject.

The Madras ruling, *Shanmuga Pillai v. Ramanathan Chetti* (1) was passed by Mr. Justice Mutusami Ayyar, who was also one of the Judges who passed judgment in *Narasayya v. Venkata Krishnayya* (2) which was discussed in the Calcutta ruling.

In his latest ruling Mr. Justice Mutusami Ayyar discusses and differs from the arguments used in the Calcutta ruling. He holds that even assuming that “suit” in Section 25 includes execution proceedings, the limitation as to jurisdiction can only be imported into Section 223 so far as it is consistent with that section, and that it would be inconsistent to import it.

Premising that it is Section 6, and not Section 25, that we hold to limit Section 223, we would observe that the special conveniences and facilities given by Section 223 to judgment-creditors are not removed but only limited by the limitation as to jurisdiction. The judgment-creditor will still be able to avail himself of the benefits under each clause of Section 223, Civil Procedure Code, but he will only be able to avail himself of them in Courts having the pecuniary jurisdiction.

The same argument is differently stated by him, that Section 223 creates a special or extraordinary jurisdiction which would be rendered ineffectual by a limitation of the pecuniary jurisdiction, but as we have pointed out above the special or extraordinary jurisdiction would not be rendered ineffectual it would only be limited in what seems to us a manner consistent with the other provisions of the Code.

The learned Judge did not refer to Section 647, but he admits that “the word suit may no doubt include in its extensive sense “proceedings after as well as before decree,” but holds that in Section 25 it may possibly be used in its popular and restricted sense to connote proceedings before decree as contra-distinguished from execution proceedings. He does not say how he thinks it was used in Section 6, but as regards Section 6 he holds that the limitation therein contained can only be imported into Section 223 so far as it can be done without incongruity. We have already met this argument.

Our opinion then is that “suit” in Section 6 includes proceedings on execution of decree, and Section 223 is therefore necessarily governed by Section 6, and that a Court to which a

(1) *I. L. R., XVII Mad.*, 309. (2) *I. L. R., VII Mad.*, 397.

decree has been sent for execution has not jurisdiction to execute such decree when it is in excess of the limits of its pecuniary jurisdiction as an original Court, and we answer the reference in the above terms.

We have arrived at the above conclusion on a consideration of the various applicable sections of the Civil Procedure Code, and we think the language of the Code is sufficiently clear to prevent any necessity of considering the intention of the Legislature, but if it had been necessary to consider that intention, we would find it difficult to believe that the Legislature would give jurisdiction to a Court to execute a decree for lakhs, which Court it would only trust to try a suit of one hundred rupees in value.

It is not denied that in execution of decrees questions of difficulty and importance often arise not much less than those involved in the decisions of the suit.

Another anomaly arises in the fact that the course of appeal is changed. When a Court of lowest jurisdiction can execute any decrees the appeal from that Court may lie (as happened in this case) direct to the Chief Court, whereas it would ordinarily lie to the District or Divisional Judge.

With reference to the argument of convenience. It is no doubt often convenient for the disposal of business that the higher Courts should have their decrees executed by inferior Courts, but this is an argument that cannot well be advanced to give inferior Courts jurisdiction over matters which they are not properly qualified to decide.

As regards the convenience of litigants it is not very clear to us that litigants will be much inconvenienced by the execution of their decrees being limited to Courts having jurisdiction to hear the suits in which the decrees were passed; there will always be at least one such Court in every district, and the inconvenience in having a difficult decree executed by an imperfectly qualified Court must not be overlooked.

The case was finally disposed of by the following order of the Divisional Bench (*Clark, C. J.*, and *Chatterji, J.*)

CLARK, C. J. —In accordance with the decision of the Full Bench the order of Mr. Warburton is set aside as passed without jurisdiction, and the case is remanded to the District Judge for disposal in his own Court or in some Subordinate Court having jurisdiction.

6th Dec. 1900.

Appeal allowed, cause remanded.

No. 10.

Before Mr. Justice Reid and Mr. Justice Harris.

KESAR SINGH AND OTHERS,—(DEFENDANTS),—
APPELLANTS,

Versus

APPELLATE SIDE. }

THAKAR DAS,—(PLAINTIFF),

KAKA,—(DEFENDANT),

} RESPONDENTS.

Further Appeal No. 816 of 1897.

Limitation—Limitation Act (XV of 1877), Schedule II, Article 141—Adverse possession.

By a mortgage entered into between the plaintiff's ancestors and defendant, Kaka, in 1879, it was agreed that the whole amount should be repaid by instalments, and in default of payment of any instalment the possession of the mortgaged property was to be taken by the mortgagee. In 1885 the mortgagor sold a certain portion of the mortgaged property to defendants 1 and 2, and in 1886 the mortgagee sued the mortgagor for possession without making the first two defendants parties to that suit and obtained a decree in 1886 for possession, but never got actual possession.

Subsequent to the decree the mortgagor sold the remainder of the mortgaged property to the other defendants. In 1895 the mortgagee's heirs filed the present suit for possession of the land.

Held, that as the period for plaintiff's claim as regards the first two defendants could only be reckoned from the date of the original default in payment of instalment under the mortgage-deed of 1879, which could not have been later than 1882, and they having been in possession at the time of the prior suit to which they were not made parties and were therefore not bound by that decree and as with respect to that portion of the land the mortgagor had no right, title or interest left in it subsequent to their sale in 1895, the suit was barred by limitation. But as regards those defendants who acquired their title subsequent to the decree of 1886 against the mortgagor that decree stands against them and they can claim no title by adverse possession, the suit having been instituted within twelve years from their obtaining possession.

Further appeal from the order of J. A. Anderson, Esquire, Divisional Judge, Amritsar Division, dated 3rd April 1897.

Duni Chand, for appellants.

Sohan Lal, for respondents.

The judgment of the Court was delivered by

8th Nov. 1900.

HARRIS, J.—Notice to Kaka, defendant-respondent has not been received back after service, but as he was a mere *pro formâ* defendant and had parted with all right in the land which is the subject-matter of the suit, the appeal will proceed without him.

We overrule a preliminary objection taken by the pleader for plaintiffs-respondents that the application to bring the representative of Ghasita, deceased, defendant-appellant on the record, was made out of time on the ground that there is no counter-affidavit to the affidavit of the applicants, which was to the effect that Ghasita died some four months before the application, and that under the circumstances of the case there appears to have been sufficient cause for delay in making the application.

We find the following to be the facts material for the decision of this appeal :—

In 1879, Kaka mortgaged 23 *ghumaos* 4 *kanals* 4 *marlas* of land, including the land here in suit, by registered deed to Sham Singh (whose representatives plaintiffs are) for Rs. 488-5-0, payable in instalments of Rs. 81, the first instalment to fall due on the 1st Jeth, Sambat 1936 (= 13th May 1879), possession of the land to be given in default of payment of any instalment.

On the 9th November 1885 Kaku sold 3 *ghumaos* 4 *kanals* 13 *marlas* out of the mortgaged land by registered deed to Natha, defendant, and three days later 2 *ghumaos* 7 *kanals* 4 *marlas* to Amir *alias* Amrik Singh (now deceased, and represented by others of the defendants) also by registered deed.

On the 16th February 1886 Sham Singh sued Kaka for possession under the mortgage of 1879, there having been default in payment of instalments and obtained a decree on the 11th June 1886 against Kaka, under which he obtained formal but not actual possession.

Subsequent to that decree and formal possession, Kaka sold the balance of the mortgaged land to others of the defendants. We find on the evidence that none of the defendants obtained possession before 1887.

The present suit for possession of 18 *ghumaos* 4 *kanals* 16 *marlas* out of the land mortgaged to Sham Singh was brought by his heirs and representatives, the plaintiffs, in 1895.

On the plea of misjoinder again raised here we hold there is no misjoinder of causes of action, and that the Courts below exercised a proper discretion in allowing a joinder of defendants which certainly has not prejudiced the defendants, or any of them, in their defence.

But we hold that whereas Natha and the heirs of Amrik Singh, defendants, have a good defence to the claim, the other defendants whose rights were acquired subsequent to the decree of 1886 have no right of possession as against the plaintiffs-mortgagees.

For as against those defendants the decree against Kaka followed by a formal delivery of possession to Sham Singh stands, and on the facts they have no title by adverse possession, the claim having been instituted within the twelve years' period from their taking possession.

We therefore hold that the Courts below have rightly decreed the claim against those defendants.

But as regards the defendants who hold under deeds of sale prior to the suit of 1886, it is quite clear that they were no parties to that suit, and are not bound by that decree or proceedings consequent thereon since with respect to so much land Kaka had no right, title or interest subsequent to the sales of 1885, as to which sales no suggestion has been made that they were collusive or fraudulent.

We therefore consider that as regards the land of Natha and Amrik Singh in suit, the period of limitation for plaintiff's claim is not to be reckoned from any date other than that of the original default in payment of instalment under the deed of 1879, which at latest cannot be after 1882. So far then we hold the claim (instituted in 1895) to be time-barred and so far we dismiss it.

The result is that plaintiff's claim remains decreed except as to the land sold to Natha by registered deed of 9th November 1885, and that sold to Amir *alias* Amrik Singh by registered deed of 12th November 1885, with respect to which the claim is dismissed.

Under the circumstances of the case we think that parties should bear their own costs throughout the litigation, and we order accordingly.

No. 11.

Before Mr. Justice Reid.

BHAGWAN SINGH AND ANOTHER,—(PLAINTIFFS),—
APPELLANTS,

Versus

HUKAM SINGH AND ANOTHER,—(DEFENDANTS),—
RESPONDENTS.

Further Appeal No. 427 of 1899.

Custom—Pre-emption—Mortgage—Suit for pre-emption based on mortgage—Wajib-ul-arz—Mauza Sahri, tahsil Hoshiarpur.

In a suit for possession as pre-emptors of certain mortgaged land, situate in mauza Sahri in the Hoshiarpur tahsil of the Hoshiarpur District, based upon a provision in the *Wajib-ul-arz* of the last settlement.

APPELLATE SIDE. {

Held, that the plaintiffs had failed to prove that the provision in the former *Wajib-ul-arz* had ever been acted upon, and that the true meaning of the existing *Wajib-ul-arz* was that the right of pre-emption arises, in cases of mortgages, only on foreclosure of the right of redemption.

Buland Khan and another v. Thakur Das and another ⁽¹⁾ and *Masta v. Pohlo and others* ⁽²⁾, referred to.

Further appeal from the order of S. Clifford, Esquire, Divisional Judge, Hoshiarpur Division, dated 22nd December 1898.

Sham Lal, for appellants.

Gobind Ram, for respondents.

The judgment of the learned Judge was as follows :—

REID, J.—The question for consideration is whether a right of pre-emption exists in *mauza* Sahri in the Hoshiarpur *tahsil* of the Hoshiarpur District, in respect of mortgages before foreclosure. 13th Nov. 1900.

The record of rights of the last settlement declared that right to exist, and was practically identical with the record of rights of another village in the same *tahsil* held in *Buland Khan and another v. Thakur Das and another* ⁽¹⁾ to confer that right.

The terms of the existing record of rights are, however, “*aur nisbat rehn agarche ziada pabandi shufa ki nahin hai, magar jahan surat tanaza howi, wahan kanun ki mutabik amal howi.*”

Counsel for the appellant contends that the concluding words apply to a conflict between rival rights of pre-emption, and that the effect of the record of rights is that rival claims are to be decided in accordance with the provisions of Section 12 of the Punjab Laws Act, the existence of the right, conferred by the previous record of rights, not being affected by the new record.

The appellant has only been able to cite one case, out of a large number of mortgages proved to have been effected in which the right of pre-emption was asserted. The claim was allowed by a Tahsildar in 1866, and no appeal was filed by the purchaser.

I see no reason to doubt that the true meaning of the existing record of rights is that Section 9 of the Laws Act is to apply, and that the right of pre-emption arises, in cases of mortgage, only on foreclosure of the right of redemption.

Masta v. Pohlo and others ⁽²⁾ does not help the appellant.

The appeal fails and is dismissed with costs.

Appeal dismissed.

⁽¹⁾ 10, P. R., 1887. ⁽²⁾ 52, P. R., 1896.

No. 12.

Before Mr. Justice Reid and Mr. Justice Harris.

NAWAB-UD-DIN,—(DEFENDANT),—APPELLANT,

Versus

MUSSAMMAT KAMI,—(PLAINTIFF),

MUSSAMMAT RAJJI AND ANOTHER,

—(DEFENDANTS),

RESPONDENTS.

APPELLATE SIDE.

Further Appeal No. 121 of 1898.

Custom—Alienation—Gift by a sonless proprietor in favour of daughter—Banda Rajputs of Ludhiana City known as Malak Rajputs in Jullundur City—Right of widow of a collateral—Accretion from ancestral property—Hindu Law.

Held, in a suit by a collateral to question an alienation, that on the death of the plaintiff during the pendency of the suit, his widow was entitled to represent her husband and to proceed with the suit instituted by him. *Mussammat Rakhi v. Mussammat Fatima* ⁽¹⁾ and *Mussammat Aso and another v. Mussammat Tabi and another* ⁽²⁾, distinguished. *Held*, also, that the parties, though residents of a city, being agriculturists, were governed by custom, and that the donor was competent under the custom prevalent amongst his tribe to transfer his self-acquired immovable property by gift to his daughter.

The rule of Hindu Law, that, as accretions from ancestral property, the acquisitions are themselves ancestral, cannot be applied to those who are governed by custom.

Mussammat Fakharunnissa v. Malik Rahim Bakhsh ⁽³⁾, *Nura v. Tora* ⁽⁴⁾, *Ghausia v. Nathu* ⁽⁵⁾, *Devi Ditta and others v. Mussammat Hukmi and others* ⁽⁶⁾, *Lekna and another v. Mussammat Thakri* ⁽⁷⁾, *Muhammad Kalu Khan v. Saifulla Khan* ⁽⁸⁾, referred to.

Further appeal from the order of F. A. Robertson, Esquire, Divisional Judge, Amballa Division, dated 4th November 1897.

Sohan Lal, for appellant.

D. R. Shah, for respondents.

The judgment of the Court was delivered by

16th Nov. 1900.

REID, J.—The parties are Malaks, belonging to a small tribe of Muhammadan Rajputs of Ludhiana City, where they are usually called Bandas, the name Malak being applied to members of the tribe living in Jullundur City. It appears that the tribe is limited to these two cities. The questions for consideration are whether Nathu, deceased husband of the respondent Mussammat

⁽¹⁾ 89, P. R., 1892.

⁽²⁾ 77, P. R., 1893.

⁽³⁾ 23, P. R., 1897.

⁽⁴⁾ 46, P. R., 1900.

⁽⁵⁾ 82, P. R., 1900.

⁽⁶⁾ 85, P. R., 1900.

⁽⁷⁾ 32, P. R., 1895.

⁽⁸⁾ 91, P. R., 1887.

Kami, could question a gift by Mehtab, his collateral, of a house and 56 *bighas* and 11 *biswas kham* of land to one of the daughters of Mehtab, and whether, on the death of Nathu, his widow, Mussammat Kami could proceed with the suit instituted by her husband.

On the evidence we are satisfied that Mussammat Kami was, at the date of the death of Nathu, his wife, and no authority against her right to be substituted for him, as his legal representative, has been cited.

The pleader for the appellant relies on *Mussammat Rakhi v. Mussammat Fatima* ⁽¹⁾ and *Mussammat Aso and others v. Mussammat Tabi and another* ⁽²⁾, for the proposition that the widow of a collateral heir cannot question an alienation, but in those cases the females were original plaintiffs, and the rules laid down are therefore inapplicable to the present case. We hold that Mussammat Kami was entitled to represent her husband and to proceed with this litigation.

The pleader for the appellant further contends that the parties, as residents of cities, are not governed by custom, and that Muhammadan Law therefore governs them, under the rule laid down in *Mussammat Fakharunnissa v. Malik Rahim Bakhsh and another* ⁽³⁾. Agricultural Muhammadan Rajputs are, however, governed by custom, and we see no reason to doubt that the parties are agriculturists. From the remarks in the pedigree-table of the present settlement, it appears that the property in suit formed part of an agricultural village, which Samman, from whom the parties are descended, helped to found, and the appellant has failed to prove that the parties have ceased to be agriculturists. Paragraph 123 of the Customary Law of the District does not help the appellant, the gift not being to a daughter pledged to celibacy, while *Nura v. Tora* ⁽⁴⁾, *Ghousa v. Nathu* ⁽⁵⁾, and *Devi Ditta and others v. Mussammat Hukmi* ⁽⁶⁾, relied on by the pleader for the appellant as establishing special customs, deal with other tribes in other districts, and we hold that the general rule prohibiting gifts of ancestral property to daughters in the presence of near male collaterals governs the parties, while Nathu and Mehtab were first cousins. Counsel for the plaintiff-respondent relies on certain passages in the *Ricaj-i-am* and the Customary Law of the Ludhiana District, for the proposition that the prohibition against gifts to daughters applies to all immovable property, whether ancestral or self-acquired. The passage mainly relied on is to be found in Article 151 of the

(1) 89, P. R., 1892.

(2) 77, P. R., 1893.

(3) 23, P. R., 1897.

(4) 46, P. R., 1900.

(5) 82, P. R., 1900.

(6) 85, P. R., 1900.

Customary Law of the District, but the rule laid down does not, in our opinion, cover the present case and does not specifically apply to self-acquired property.

We hold that Mehtab was competent to transfer his self acquired immovable property by gift to his daughter, and it has not been contended that, on the death of that daughter, the property given reverts to the male collaterals of Mehtab.

On the evidence we hold that, with the exception of a *kotha* marked A on the plan on the record and three plots of land, aggregating 10 *bighas* 13 *biswas*, viz.,

					<i>Bighas.</i>	<i>Biswas.</i>
No.	52	...	...	...	5	4
No.	144	...	...	...	2	7
and No.	33	...	...	...	3	2

the property in suit descended from Madu, the common ancestor of the parties.

Counsel for the plaintiff-respondent contends that, inasmuch as there is no evidence that Mehtab, who purchased these three plots from Muhammad Bakhsh and Sharaf Din, and the *kotha* from Ganga Ram, had any source of income other than the ancestral land, we must apply the rule of Hindu Law and hold that, as accretions from ancestral property the acquisitions are themselves ancestral. We cannot accede to this contention, the parties being Muhammadan Rajputs governed by custom, while the distinction drawn between Hindu law and custom, and the definition of ancestral, in *Lehna and another v. Mussammat Thakri* (1) at pages 128 and 134, respectively, are against the contention. *Muhammad Kalu Khan v. Saifulla Khan* (2) does not help the respondent. It was contended that the evidence of Ganga Ram was inadmissible, inasmuch as he deposed to a sale by deed, that deed not being produced and the failure to produce not being accounted for, but Ganga Ram was not cross-examined and the written statement contained an allegation that all documents had been removed by Roda, husband of another daughter of Mehtab. The party objecting to the evidence of Ganga Ram should have cross-examined him as to the deed and the objection was not taken below.

We modify the decree of the lower Appellate Court by dismissing the suit for the *kotha* marked A on the plan filed, and the three plots of land, numbered 52, 144 and 33, aggregating 10 *bighas* and 13 *biswas*. The parties will pay their own costs in all Courts. In other respects the decree of the lower Appellate Court is maintained.

(1) 32, P. R., 1895. (F. B.)

(2) 91, P. R., 1887.

No. 13.

Before Mr. Justice Reid and Mr. Justice Harris.

KAKA RAM AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

RAM SARN AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Further Appeal No. 406 of 1898.

Civil Procedure Code, 1882, Sections 2 and 215 (a)—Appeal—Order directing an account—Interlocutory order—Small Cause Court Suit—Act IX of 1887, Schedule II, Articles 30 and 31—Suit for partition of offerings after taking and explaining accounts and for inspection of strong-room in which the offerings were stored—Punjab Courts Act (XVIII of 1884), Section 40 (1) (i)—Further Appeal.

Plaintiffs claiming to be interested in the income of a shrine, sued that accounts be taken and explained to them from 1871, and that they be allowed to inspect the strong-room in which the offerings were stored and for partition of such of the offerings as were partible and for their share on partition. The first Court held that they were entitled to have accounts taken from 1888 only, and passed orders under Section 215 (a) of the Code of Civil Procedure, but the Divisional Judge, on appeal, held that the order of the first Court being an interlocutory order, no appeal lay. The plaintiffs preferred a further appeal, under a certificate granted by the Divisional Judge, to the Chief Court and the defendants, amongst other objections, urged that the suit being a small cause of value not amounting to Rs. 1,000, no further appeal lay under Section 40 (1) (i).

Held, that as Section 2 of the Code of Civil Procedure includes an order, directing accounts to be taken, in the definition of decree, an appeal lay to the Divisional Courts, and that, the suit as framed being excluded by Articles 30 and 31, Schedule II, Act IX of 1887, from the jurisdiction of a Court of Small Causes, a further appeal lay under the certificate granted by the Divisional Judge, inasmuch as the nature of a suit for an account is not changed merely by reason of a share in the collection being claimed.

Mela Mal v. Harbhaj ⁽¹⁾, followed *Narayan v. Balaji* ⁽²⁾ and *Damodar Gopal Dikshit v. Chintoman Baltrishna* ⁽³⁾, distinguished. *Ranjit Singh v. Ilahi Baksh* ⁽⁴⁾, *Coverji Luddha v. Morarji Punja* ⁽⁵⁾, *Behari Lal Pandit v. Kedar Nath Mullick* ⁽⁶⁾, referred to.

Further appeal from the order of Captain C. S. Martindale, Divisional Judge, Hoshiarpur Division, dated 4th February 1898.

Sangam Lal, for appellants.

Duni Chand, for respondents.

⁽¹⁾ 115, P. R., 1884.⁽⁴⁾ I. L. R., V All., 520.⁽²⁾ I. L. R., XXI Bom., 248.⁽⁵⁾ I. L. R., IX Bom., 183.⁽³⁾ I. L. R., XVII Bom., 42.⁽⁶⁾ I. L. R., XVIII Calc., 464.

The judgment of the Court was delivered by

22nd Nov. 1900.

REID, J.—This appeal was admitted on a Rs. 10 Court-fee stamp, subject to objections at the hearing. The suit was valued at 630 Rs. and, under Section 7, IV (f) of the Court Fees Act, should bear a stamp of 47 rupees 4 annas. This stamp was affixed to the plaint, but on the memoranda of appeal in the lower Appellate Court and in this Court a stamp of 10 rupees only was affixed.

The appeals being against the order directing that accounts be taken and against the decree dismissing the appeal, respectively, should be stamped with the *ad valorem* stamp prescribed by the above-mentioned Article of the Act.

Under the order of the Court the deficiency in this Court has been made up, but we have not called on the appellants to make up the deficiency in the lower Appellate Court, following *Mela Mal v. Harbhaj* ⁽¹⁾, no question as to the amount of fee payable having been raised in, or decided by, that Court, Counsel for the respondents contends that, under Section 40 (1), proviso (2), of the Punjab Courts Act, no further appeal lies, the suit being a small cause of value not amounting to one thousand rupees.

Reliance is placed on *Narayan v. Balaji* ⁽²⁾, dealing with a suit to recover 339 rupees 14 annas 2 pies as the plaintiffs' $\frac{1}{2}$ share in certain *dhara* and *khoti* properties, or any other sum which might be found due to them from the defendant, the managing *khot*, on taking accounts between them. Farran, C. J., held that the question whether the suit was "excepted from the jurisdiction of the Small Causes Court," as a suit for an account, was determined by *Damodar Gopal Dikshit v. Chintaman Balkrishna* ⁽³⁾, which was not distinguishable from the case before the Court, the plaint in neither case containing an allegation that the profits sought had been wrongfully received.

The learned Chief Justice continued : " By merely asking, in " the alternative, for an account of the profits the plaintiff cannot " convert a suit cognizable by a Court of Small Causes into one of " a different nature. There is no account, within the meaning of " Article 31, Schedule II of the Small Cause Courts Act, here to be " taken. A definite sum only is to be ascertained, *viz.*, the amount " of profits received by the defendant during the years in question, " from which, by a simple calculation, what the plaintiff's share in " those profits amounts to can be ascertained."

⁽¹⁾ 115, P. R., 1884. ⁽²⁾ I. L. R., XXI Bom., 248.

⁽³⁾ I. L. R., XVII Bom., 42.

In the XVII Bombay case cited it was held that the only relief claimed was the payment of money. Sargent, C. J., said : " If the plaintiffs had alleged that the defendant had wrongfully received the plaintiff's share of profits, then, no doubt, the suit would have fallen under clause 31 of the Schedule II. But the plaintiffs' allegation is that the defendant rightfully received, but wrongly retained, the profits. To such a suit clause 31 has no application."

In the suit before us the plaintiffs prayed (1) that accounts might be taken and explained to them ; (2) to be allowed to inspect the strong-room in which the offerings were stored ; (3) for partition of such of the offerings as were partible, and for their share on partition. The suit was valued at 130 rupees, as the approximate share of the plaintiffs, and at 500 rupees on account of the inspection of the strong-room. It entailed the consideration of the rules for the management of the Bajreshuri temple at Bhaun, Kangra, the defendants being the Chaudhris and the plaintiffs being the rest of the *pujaris* and shareholders, of the temple, and the Court of first instance held that the plaintiffs were entitled to have accounts taken every six months.

The facts and the frame of the suit are clearly distinguishable from those in the Bombay cases cited, and we cannot hold that it is not a suit for an account, merely by reason of a share in the collections being claimed. We see no reason to doubt that the suit is excluded by Article 31, Schedule II, Act IX of 1887, and possibly by Article 30 of the Schedule, from the jurisdiction of a Court of Small Causes, and that a further appeal consequently lies, under the certificate granted by the lower Appellate Court.

Counsel for the respondents further contends that the appeal has abated, several parties having died more than six months before applications were made for bringing their legal representatives on to the record.

Having regard to the number of parties we concur in the reasons recorded in the *ex parte* order allowing substitution after the expiry of the period of limitation provided, and we see no reason for delaying the hearing of this appeal in order to bring on to the record the legal representatives of respondents who died after Ram Sarn, Jewan and Behari, who are at present alive, were appointed under Section 30 of the Code of Civil Procedure, to defend the appeal on behalf of all the respondents. Counsel for the respondents has been instructed by Jiwan. The remaining question for consideration is whether an appeal lay to the lower Appellate Court.

Section 2 of the Code of Civil Procedure includes an order directing accounts to be taken in the definition of "decree." Counsel for the respondents cites cases under Act X of 1877, which are obviously not in point, having been decided before the amendment of the definition of decree by the present Code, and on *Ranjit Singh v. Ilahi Bakhsh* ⁽¹⁾, *Coverji Laddha v. Morarji Punja* ⁽²⁾, and *Behari Lal Pundit v. Kedar Nath Mullick* ⁽³⁾, which do not help him, for the proposition that an order under Section 215 (a) of the Code, under six heads, each commencing "Let an account be taken" is not an order directing that accounts be taken.

In the absence of authority we are unable to hold that this proposition has any force, and we hold that an appeal lay to the Divisional Court. We set aside the decree of the lower Appellate Court and under Section 562 of the Code of Civil Procedure, we remand the appeal to that Court for decision on the merits.

The Court-fee on the memorandum of appeal will be refunded, and costs will be costs in the cause.

Appeal allowed : cause remanded.

No. 14.

Before Mr. Justice Robertson.

RALA,—(DEFENDANT),—APPELLANT,

Versus

BAUNA AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Further Appeal No. 156 of 1900.

Custom—Gift—Validity of gift to one of several heirs—Kang Jat of Garhshankar tahsil, Hoshiarpur District.

In a suit the parties to which were Kang Jats of the Garhshankar tahsil, Hoshiarpur District, a gift by a sonless proprietor of his land to one of his heirs who had been for a long time cultivating with and supporting the donor, to the exclusion of the rest, was found valid by custom.

Sobha v. Gyana ⁽⁴⁾, *Gyul Singh v. Kheman* ⁽⁵⁾, *Indar v. Luddar Singh* ⁽⁶⁾, *Sher Singh v. Sohail Singh* ⁽⁷⁾, *Karim Bakhsh v. Fatta* ⁽⁸⁾, *Narain Singh v. Gurnukh Singh* ⁽⁹⁾, *Naula v. Mian Khan* ⁽¹⁰⁾, and *Sahib Din v. Amira* ⁽¹¹⁾, referred to.

Further appeal from the order of S. Clifford, Esquire, Divisional Judge, Hoshiarpur Division, dated 3rd January 1900.

Muhammad Shafi, for appellant.

B. C. Chatterji, for respondents.

⁽¹⁾ *I. L. R.*, VIII All., 520.

⁽²⁾ *I. L. R.*, IX Bom., 183.

⁽³⁾ *I. L. R.*, XVIII Cal., 464.

⁽⁴⁾ 116, *P. R.*, 1886.

⁽⁵⁾ 85, *P. R.*, 1889.

⁽⁶⁾ 18, *P. R.*, 1890.

⁽⁷⁾ 19, *P. R.*, 1890.

⁽⁸⁾ 113, *P. R.*, 1891.

⁽⁹⁾ 116, *P. R.*, 1894.

⁽¹⁰⁾ 101, *P. R.*, 1892.

⁽¹¹⁾ 16, *P. R.*, 1889.

The judgment of the learned Judge was as follows :

ROBERTSON, J.—The facts of the case are fully set forth in the 4th Augt. 1900. orders of the two lower Courts. The appellant received certain land in gift from one Dula Singh, a Kang Jat of Garshankar, Hoshiarpur. He is as nearly related to the deceased as any of the plaintiffs, and was entitled as heir to one-third of deceased's property. It is clearly proved that Rala, the donee, did render services to deceased, an old man, in the way of cultivating his land for him and supplying him with food-stuff, although the actual extent of the services may not be quite ascertained. The land of which a gift was made was not all the property deceased had, though it was all that was then unencumbered. It has no doubt been established in a great many cases among various tribes of the Central Punjab that a sonless Jat proprietor may alienate his land to—indeed appoint as an heir—one out of his near collateral kinsman to the exclusion of others in cases where alienations to a stranger would be entirely restricted. There seems to me no reason to doubt the existence of this custom in the branch of Jats to whom the parties belong. A long array of rulings was quoted to prove the general prevalence of the custom—*Sobha v. Gyana* ⁽¹⁾, *Gopal Singh v. Kheman* ⁽²⁾, *Indar v. Luddar Singh* ⁽³⁾, *Sher Singh v. Sohail Singh* ⁽⁴⁾; *Karim Bakhsh v. Fattu* ⁽⁵⁾, *Narain Singh v. Gurmukh Singh* ⁽⁶⁾, *Nauli v. Min Khan* ⁽⁷⁾, and *Sahib Din v. Amira* ⁽⁸⁾, *inter alia*, and after considering these and the evidence in the case, I am of opinion that the gift in question must be held to be valid, and I accept the appeal and decree accordingly, dismissing plaintiffs claim as regards the gift costs against respondent.

Appeal accepted.

⁽¹⁾ 116 P. R., 1886.

⁽²⁾ 85, P. R., 1889.

⁽³⁾ 18, P. R., 1890.

⁽⁴⁾ 19, P. R., 1890.

⁽⁵⁾ 113, P. R., 1891.

⁽⁶⁾ 116, P. R., 1894.

⁽⁷⁾ 101, P. R., 1892.

⁽⁸⁾ 16, P. R., 1889.

No. 15.

Before Mr. Justice Robertson and Mr. Justice Maude.

JOTI MAL,—(DECREE-HOLDER),—PETITIONER,

Versus

REVISION SIDE. {

COATES,—(JUDGMENT-DEBTOR),—

H. H. THE MAHARAJA OF { RESPONDENTS.

FARIDKOT,—(OBJECTOR),—

Civil Revision No. 532 of 1900.

Revision—Chief Court's powers of—Practice—Civil Procedure Code, 1882, Section 622—Punjab Courts Act, 1884, as amended by Act XXV of 1899, Section, 70.

Held, that as a general rule the Chief Court will not exercise its extraordinary powers of revision under Section 70 of the Punjab Courts Act, as amended by Act XXV of 1899, on the ground that a subordinate Court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction with material irregularity, so long as there is any other remedy open to the party professing to be injured whereby he may obtain the relief sought.

Petition for revision of the order of Khan Sahib Maulvi Muhammad Hussain, District Judge, Ferozepore, dated 4th April 1900.

Ishwar Das, for petitioner.

Beechey, Karaka, and A. L. Roy, for respondents.

The judgment of the Court was delivered by

30th Nov. 1900.

MAUDE, J.—This is an application for the revision of an order passed by the District Judge, under Section 280 of the Code of Civil Procedure, releasing from attachment in execution of decree certain property which was claimed by His Highness the Raja of Faridkot. A preliminary objection has been raised on behalf of the respondents that this Court has no authority to entertain the application because Section 283 of the Code permits a party against whom such an order has been passed to institute a suit to establish the right which he claims to the property in dispute, but "subject to the result of such suit, if any," the section enacts that "the order shall be conclusive." As to our jurisdiction to entertain the application, and if we considered it desirable, in the interests of justice, owing to some material irregularity in the District Judge's proceedings, to interfere with the order passed, we have no doubt whatever. The language of Section 622 of the Code is sufficiently wide to embrace cases in which parties have open to them other remedies than by applying to this Court for revision. But at the same time we are equally clear that, as a rule, a High Court

should refuse to interfere when the party professing to be injured has another remedy. This *dictum* indeed has been briefly stated in a Full Bench decision of this Court in the case of *Narain Das and another v. Manohar Lal and others* ⁽¹⁾, and is in accordance with repeated decision of the High Courts (*Shiva Nathaji v. Joma Kashinath* ⁽²⁾, *Kashinath Sakha Ram Kulkarni v. Nana* ⁽³⁾, *Guisse v. Jaisraj* ⁽⁴⁾, and *Ghulam Shabbir v. Devarka Prasad* ⁽⁵⁾).

The learned pleader for the petitioner has cited the ruling of this Court just mentioned, as an instance in which the Court did exercise its revisional powers, although the petitioners had another remedy open to them, namely, a regular suit. But a reference to that ruling shows that the case was entirely different from the present one. There the object of the learned Judges was to consider and decide authoritatively the important question whether it was or was not competent to a Court (upon an application, under Section 525 of the Civil Procedure Code, to file an award) to inquire into and decide objections other than those specified in Sections 520 and 521 of the Code. The decision given settles the question for all the Civil Courts in this Province. But in the present instance there is no general question of importance for decision, and if we decided to interfere with the order passed by the District Judge, our interference would not even settle the matter in dispute, for we could do no more than set aside the order already passed on account of some alleged material irregularity in the District Judge's procedure, and direct him to re-hear the objection made to the attachment of the property, and whatever order he might ultimately pass, the aggrieved party would have a right to contest it by a regular suit. We are clearly of opinion therefore that this is a case in which we should decline to interfere, and we are prepared to lay down, as a general rule, that where a person asks this Court to exercise its extraordinary powers of revision under Section 70 of the Punjab Courts Act, as amended by Act XXV of 1899, on the ground that a subordinate Court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction with material irregularity, such person must satisfy this Court that he has no other remedy open to him whereby he may obtain the relief sought. The application is rejected with costs.

Application dismissed.

⁽¹⁾ 21, P. R., 1898.

⁽³⁾ I. L. R., XXI Bom., 731.

⁽²⁾ I. L. R., VII Bom., 341.

⁽⁴⁾ I. L. R., XV All., 405.

⁽⁵⁾ I. L. R., XVIII All., 163.

No. 16.

Before Mr. Justice Reid.

APPELLATE SIDE. { MAHMUD KHAN,—(PLAINTIFF),—APPELLANT,
Versus
RAM DAS AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Further Appeal No. 632 of 1900.

Pre-emption—Custom—Presumption as to existence of custom of pre-emption—Rebuttal of—Punjab Laws Act (IV of 1872), Section 10.

Held, that to establish a custom opposed to that which must, under Section 10 of the Punjab Laws Act, be presumed to exist, it was not sufficient to prove that, notwithstanding several sales of land in the village, no suit for pre-emption was ever filed or that the present Settlement record was silent on the subject.

Samand Khan v. Mahtaba (1), followed.

Further appeal from the decree of Rai Bahadar Sodhi Hakam Singh, Diwan Bahadar, Divisional Judge, Sialkot Division, dated 18th April 1900.

Ishwar Das and Sukh Dyal, for respondents.

The judgment of the learned Judge was as follows :—

6th Dec. 1900.

REID, J.—The lower Appellate Court has held that a custom abrogating the right of pre-emption, which, under Section 10 of the Punjab Laws' Act, is presumed to exist unless the contrary is proved, has been proved, (i) because the Settlement record of 1891-92 is silent on the subject, although the *Riwaj-i am* of the 1865 Settlement, stated that a proprietor who may wish to sell his land should offer it first to a village proprietor or to his co-sharers in the land, and the records of 1855 Settlement contained a similar provision; (ii) because 15 sales of land in the village had taken place without a single suit for pre-emption.

The appellant admits that no suit for pre-emption was ever filed in respect of land in this village before those filed in 1899 by himself and Hakam.

The facts of this case are practically on all fours with those in *Samand Khan v. Mahtaba* (1) in which the lower Appellate Court had held that the custom of pre-emption must be held to have been set aside because 15 sales of land in the village had been effected to strangers.

In that case, as in this, the Settlement records prior to the passing of the Punjab Laws' Act recited the existence of a custom of

(1) 48, P. R., 1883.

pre-emption. The only distinction between the two cases is that the Settlement prior to the passing of the Act subsisted at the date of suit in *Saman Khan v. Mahtaba* (1), and that the Court found that the failure to assert the right of pre-emption was apparently due to the poverty of the proprietors.

The following passages in the judgment are clearly applicable:—

“It is clear that under Section 10 of the Punjab Laws Act the right must be presumed to exist. The burden of proving that it does not exist rests therefore on the defendants. Now all that they have proved is that while a considerable number of sales to strangers has taken place, the right of pre-emption has never been asserted. We think, however, that this is not of itself a sufficient ground for holding that the custom does not exist or has been set aside.

“It is not enough to show that some sales have taken place which were not objected to, for it was discretionary with the co-proprietors to object or not, and their mere acquiescence in previous sales does not imply that the custom which would entitle them to object to the sales and to claim the benefit for themselves has been abrogated.”

The respondents have failed to establish a custom opposed to that which must, under Section 10 of the Act, be presumed to exist.

Under Section 562 of the Code of Civil Procedure, I set aside the decree of the lower Appellate Court, and remand the case for disposal on the merits. The Court fee on the memorandum of appeal will be refunded, and costs will be costs in the cause.

Appeal allowed : cause remanded.

No. 17.

Before Mr. Justice Robertson and Mr. Justice Maude.

TARA CHAND,—(PLAINTIFF),—APPELLANT,

Versus

THE GANESH FLOUR MILLS COMPANY, LIMITED, DELHI,
—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Further Appeal No. 718 of 1898.

Public Company—Power and authority of Directors—Articles of Association—Ratification by Company of acts ultra vires of Directors—Condition vital to contract or merely ancillary to it:—Evidence as regards.

(1) 41, P. R., 1883.

Where Articles of Association of a Company empowered the Directors generally to do all such acts as under the Indian Companies Act and Articles of Association are directed or authorized to be done by the Company in General Meeting, *held*, that this authority did not absolve the Directors from the necessity of observing the established principles which should regulate their management of the Company's affairs, and if their acts were not reasonably necessary for efficient management, the Company would not be bound by them.

Held, further, that to establish ratification by the Company of acts *ultra vires* of the Directors it was necessary for the plaintiff to prove (1) that the shareholders present at the meeting at which it was alleged that ratification had been accorded, had clear knowledge of what was to be ratified, and (2) that the absent shareholders had individually assented to the ratification.

Whether a particular clause in an agreement should be held to embody a condition vital to the contract, or one subsidiary to its main purpose must depend upon the intention of the contracting parties, and if possible that intention should be gathered from the terms of the agreement itself.

Ashbury Railway Carriage and Iron Company v. Riche ⁽¹⁾; *Houldsworth v. Evans* ⁽²⁾, and *Phosphate of Lime Company v. Green* ⁽³⁾, referred to.

Further appeal from the order of D. C. Johnstone, Esquire, Additional Divisional Judge, Delhi Division, dated 29th March 1898.

Grey and K. P. Roy, for appellant.

Parker, for respondents.

The questions of law arising and the facts in connection therewith, sufficiently appear from the judgment of the Court which was delivered by.

9th Dec. 1900.

MAUDE, J.—In this case the plaintiff, Tara Chand, a merchant of Bombay, sued the Ganesh Flour Mills Company, Limited, Delhi, to recover the sum of Rs. 3,000 alleged to be due to him under a deed of agreement entered into between him and the Directors of the defendant Company on November 6th, 1894. The plaintiff set out that by the above-mentioned agreement, in consideration of the purchase by the plaintiff, upon the terms and conditions specified in the agreement, of 200 shares in the Company, the Company agreed among other things to pay to the plaintiff a commission of one anna per maund of bran sold by the said Company to any person other than the plaintiff for a period of fifteen years, commencing from July 26th, 1894. As the Company had not paid the plaintiff any commission subsequent to September

⁽¹⁾ L. R. 7, H. L. 653. ⁽²⁾ L. R. 3, H. L. 263.

⁽³⁾ L. R. 7, C. P. 56.

30th, 1895, he claimed Rs. 3,000 as approximately the amount due, including interest up to the date of suing. The defendant Company admitted that its Directors had entered into the agreement in question, but pleaded that the agreement was "*ultra vires* of the powers of the Directors to bind the Company, and that it was unreasonable and voidable, and that the Company had refused to be bound by it, and had put an end to it." It was also pleaded that one of the conditions of the agreement was that the plaintiff should continuously hold 25 shares in the Company, and that since November 19th, 1895, he had ceased to hold that number.

The District Judge found that the Directors had exceeded their powers, and that the Company was not bound by the agreement, as it had not ratified the acts of its Directors. He also found that the plaintiff having ceased to possess 25 shares in the Company was not entitled to reap the benefits secured to him under the agreement. The suit was therefore dismissed. In appeal the learned Divisional Judge arrived at the same final conclusion as regards the justice of the plaintiff's claim, but he differed from the finding of the lower Court as regards the question of ratification which he held was proved.

Before us the learned counsel for the plaintiff-appellant has argued his client's case at considerable length. Briefly stated his arguments are these: (1) the agreement entered into was *intra* not *ultra vires* of the Directors, and therefore the agreement binds the Company; (2) even assuming that they acted *ultra vires* of their powers their acts were sufficiently ratified by the shareholders; (3) the plaintiff duly performed all the conditions of the contract, and did in fact continuously possess 25 shares in the Company; (4) even if at one period he did not possess that number his promise to do so was not a promise vital to the contract, but subsidiary or collateral to its main purpose, and its breach was insufficient to discharge the Company from its obligation.

In support of the first contention Article 73 of the Articles of Association has been relied on as showing that subject to the provisions of the Indian Companies Act and the Articles themselves, the Directors are authorized to exercise any powers which might be exercised by the shareholders of the Company assembled in General Meeting. This is a proposition to which we are wholly unable to assent for reasons which will be explained, nor does it appear that this position was ever assumed in the District Judge's Court. There, when the defendant company had pleaded that the agreement was *ultra vires* of the Directors the Judge asked the plaintiff's counsel why, he said, that the Directors had the power to enter into

the contract, and he replied that it was inherent in the Directors, and that they also had the power by custom and law : no reference was made to the Articles of Association. We also observe from a perusal of copies on the record of some of the proceedings of General Meetings of the Company that on more than one occasion resolutions were carried confirming certain acts of the Directors or authorizing them to perform certain acts, whereas no such confirmation or authority was required had the Directors themselves possessed the powers of the shareholders in General Meeting in regard to such matters. The article relied on is somewhat prolix and obscurely worded, but even if it be interpreted in the sense propounded by the learned counsel it amounts to no more than this, namely, that the Directors may exercise all such powers and generally do all such acts as under the provisions of the Indian Companies Act and the Articles of Association are directed or authorized to be exercised or done by the Company in General Meeting. We cannot, however, accept the view that because the Act and the Articles place no definite limitations upon the powers of the Company in dealing with outside parties, therefore the Directors are empowered to do anything that the Act and Articles do not expressly prohibit, and are absolved by the article in question from the necessity of observing the well-established principles which should regulate their management of the Company's affairs. Their general authority would undoubtedly extend to the performance of all acts reasonably necessary for efficient management, but we have no hesitation in holding that the agreement as to the payment of commission to the plaintiff on account of sales of bran does not fall within that category. A perusal of clauses 7 and 8 of the deed of contract shows that the Directors entered into what was practically a unilateral agreement, the benefit of which was secured wholly to the plaintiff. By this agreement he was to have the right of refusing to pay the rate at which the Company might offer to sell bran to him and of stating to the Company any rate which he was prepared to give, but if the Company found itself unable to accept his tender it bound itself for fifteen years to pay him one anna for every maund of bran that it might sell to third parties. Thus the plaintiff had only to decline to pay the rate offered to him and to substitute an unremunerative one which the Company was certain to refuse to accept, and he was to get one anna for every maund of bran sold by the Company during so long a period as fifteen years. And that this was what he intended to do ; we have his own word : " I did not get the rate of the *bhousa* from the Company. I did not ask them to tell me the rate. I never desired to have the *bhousa*. I never took it." Clearly the

plaintiff's object was to obtain annually a comparatively large amount from the Company and do nothing in return for the payment. We have no hesitation in holding that entering into such an agreement was *ultra* and not *intra vires* of the Directors.

Next, it has been contended that the shareholders ratified the act of their Directors, and in support of this contention reliance has been placed on two reports of the Directors, dated November 14th, 1894, and April 18th, 1895, which reports were adopted by the shareholders. The reports themselves contain no allusion to the agreement in question, but in the profit and loss accounts attached to them there are entries showing payments to the plaintiff and others under the head of "commissions," while in the balance sheet of the earlier report there is also entered a payment to him and others under the head of "cessionnaires." Beyond this, however, there is no proof that the shareholders were aware of the agreement or that they ever ratified its terms. On the contrary, the proceedings of an Extraordinary General Meeting, held on July 25th, 1896, appear to indicate that the shareholders wished to undo the act of their Directors. We are clearly of opinion that there was no ratification of the act of the Directors which could bind the Company even were it proved (which it is not) that the members present at the meetings, when the two reports were adopted, were aware of the entries in the accounts. In the first place there is nothing to show how many shareholders were present, or that those present had knowledge of what was to be ratified or even any such information as would have placed them in a position to ascertain the facts as to how and why the payments to the plaintiff had been made; and, in the second place, there is the highest authority for holding that in no case could the proceedings of those meetings be deemed to bind either the absent or present shareholders. In the case of the *Ashbury Railway Carriage and Iron Company v. Riche* (1), finally decided by the House of Lords, Lord Chelmsford quoted with approval a dictum of Lord Cranworth in *Houldsworth v. Evans* (2): "In Joint Stock Companies absent shareholders should never be bound to do anything more than to assume that the Directors are doing their duty except in cases where they are informed that although the Directors have not intended to defraud the Company, yet exercising powers not legally conferred upon them, they have gone beyond what they ought to do:" and Lord Chelmsford added "I confess it seems to me that in every case of ratification by shareholders of an act *ultra vires* of Directors there ought to be not a mere presumption

(1) L. R. 7, H. L. 653.

(2) L. R. 3, H. L. 263.

"of assent from notice of the unauthorized act and absence from a meeting called to legalize it, but proof of the actual assent of each shareholder." And in his judgment in the same case Lord O'Hagan cited as very sound and apposite a passage from the judgment of Mr. Justice Willes, in the case of the *Phosphate of Lime Company v. Green* (1): "The principle by which a person, on whose behalf an act is done without his authority, may ratify and adopt it is as old as any proposition known to the law. But it is subject to one condition, in order to make it binding, it must be either with full knowledge of the character of the act to be adopted or with *intention to adopt it at all events*, and under whatever circumstances." In the present case there is absolutely nothing to show that the shareholders present at the meetings referred to had, when they adopted the Directors' reports, any knowledge of the meaning of the entries in the accounts of payments to the plaintiff. We are thus clearly of opinion that the entering into the agreement by the Directors was *ultra vires*, and that their act was not ratified by the Company.

For the above reasons alone the appeal would fail, but as we have also heard arguments on the question whether the plaintiff duly performed all the conditions of the agreement incumbent on him to perform we will record our decision on the point. Paragraph 10 of the agreement provides that the plaintiff "shall at all times during the continuance and operation of this agreement have in his possession and be the owner of not less than 25 shares of the said Ganesh Flour Mills Company, Limited." It is not denied that from November 19th, 1895, the plaintiff held only 21 shares registered in his name, but it has been contended that as a fact the plaintiff did continue to hold the required number of shares, inasmuch as he had supplied the funds with which shares had been purchased in the name of other persons, his object being to increase his voting power by obtaining proxies from those persons. We have no doubt that what the Directors wanted was not only the money subscribed by the plaintiff and his friends, but also his name, he being a merchant doing business in Bombay; and here we may point out that in the proceedings of the sixteenth meeting of the Directors held on July 26th, 1894, at which they agreed to enter into the contract with the plaintiff, one of the conditions enumerated is "Tara Chand to hold *in his own name* not less than 25 shares always." This phrase was not embodied in the agreement, but we cannot allow that the words substituted bear a different interpretation, nor has the plaintiff's

(1) *L. R. 7, C. P.* 56.

counsel been able to show any authority for the proposition that his client "had in his possession and was the owner" of shares when those shares were registered in the names of other persons. The plaintiff himself used proxies given to him by some of the very persons whose shares he now claims to have possessed and owned, thus acknowledging the title of those persons to own the shares. We hold then that the plaintiff did not perform the obligation required from him in paragraph 10 of the agreement.

There remains for consideration the question whether the plaintiff's default in that respect so frustrated the objects of the contract as to discharge the Company from its liabilities, supposing that the agreement had bound the Company. Whether a particular clause in an agreement should be held to embody a condition vital to the contract must depend upon the intention of the contracting parties, and, if possible, that intention should be gathered from the terms of the agreement itself. In this case we think that the wording of paragraph 10 is sufficiently precise to warrant the inference that the Directors did consider it a matter of real importance that the plaintiff should for fifteen years himself hold not less than twenty-five shares in the Company, and this view is supported by the fact that subsequent to his parting with some of his shares they did not pay him any commission on the sales of bran. On all grounds therefore the appeal fails, and is dismissed with costs.

Appeal dismissed.

No. 18.

Before Mr. Justice Reid.

IMAMI,—(DEFENDANT),—PETITIONER,

Versus

SADDAN AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

} REVISION SIDE.

Civil Revision No. 808 of 1900.

Suit against minor—Appointment of guardian ad litem—Suit when instituted—Limitation Act, 1877, Section 4.

Held, that a suit to recover money due on a bond in which two of the defendants were minors and the application for the appointment of a guardian *ad litem* to the minor defendants was presented two days after the suit was filed, must be deemed to have been instituted against them when the plaint was filed and not when the application for the appointment of the guardian *ad litem* was made, as the Code of Civil Procedure does not require that the application should be made with the plaint and form part of it.

In re Motiram Rupachand (1) and *Khem Karan v. Har Dayal* (2), followed.

(1) 11 Bom., H. C. R., 21. (2) I. L. R., IV All., 37.

Petition for revision of the order of Mr. Kirthi Singh, Judge, Small Cause Court, Delhi, dated 6th April 1900.

Lakshmi Narain, for petitioner.

Daulat Ram, for respondents.

The judgment of the learned Judge was as follows :—

13th Dec. 1900.

REID, J.—The decree of the Court below cannot stand.

A plaint, including “Saddan and Madan, minor sons of “Hussaini, through Mussammatt Sohni as guardian,” among the defendants, was filed on the last day of the period allowed by the Limitation Act.

Two days afterwards an application for the appointment of Mussammatt Sohni, mother of the minor defendants, as their guardian *ad litem*, was presented, and the Court below has held that the suit must be deemed to have been instituted when this application was presented, and must consequently be held to be barred by limitation.

Section 440 of the Code of Civil Procedure runs thus : “Every suit by a minor shall be instituted in his name by an adult person,” &c., while Section 443 runs, “Where the defendant to a suit is a minor, the Court, on being satisfied of the fact of his minority, shall “appoint a proper person to be guardian for the suit for such minor,” &c. The Code does not lay down a rule that the application, for appointment of a guardian *ad litem* to a minor defendant, shall be filed with the plaint and form part thereof.

In re Motiram Rupachand ⁽¹⁾, Westropp, C. J., and Melvill, J., held that Section 2, Act XX of 1864 (repealed by the Guardians and Wards Act, VIII of 1890), which provided for minors being represented, did not prohibit a suit being instituted against a minor before a certificate of administration to the estate of the minor had been granted, and that a suit might be so instituted, the duty of the plaintiff being to apply, immediately after the institution of the suit, for the appointment of an administrator.

The point has been dealt with in *Khem Karan v. Har Dayal* ⁽²⁾, by Straight, J., who held that, even if it were necessary to amend the plaint, the period of limitation would be calculated only from the date when the plaint was first presented.

In the present case the plaintiff applied for the appointment of a guardian *ad litem* within a reasonable time of filing his plaint, and I have no hesitation in holding that his suit was not barred by limitation.

⁽¹⁾ 11 Bom., H. C. R., 21. ⁽²⁾ I. L. R., IV All., 37.

I set aside the decree of the Court below and, under Section 562 of the Code of Civil Procedure, I remand the suit for decision on the merits, the first step to be taken by the Court below being the disposal of the application for the appointment of a guardian *ad litem*, if that has not already been disposed of according to law.

The Court-fee on this application will be refunded, and costs will be costs in the cause.

Application allowed : cause remanded.

No. 19.

Before Mr. Justice Robertson and Mr. Justice Maude.

FAQIR CHAND,—(DEFENDANT),—PETITIONER,

Versus

MUSSAMMAT BAL KAUR,—(PLAINTIFF),—RESPONDENT.

} REVISION SIDE.

Civil Revision No. 1160 of 1899.

Revision—Small Cause Court suit—Error of law—Chief Court's powers of revision—Discretion—Provincial Small Cause Courts Act, 1887, Section 25.

Where upon the circumstances of the case the view of the law taken by the lower Court was not on the face of it incorrect, and there was no reason to think that injustice has been committed the Chief Court declined to use its discretionary power of revision under Section 25 of the Provincial Small Cause Court Act.

Secretary of State for India in Council v. Johnson ⁽¹⁾, *The Poona City Municipality v. Ramji Raghunath* ⁽²⁾, and *Sarman Lal v. Khuban* ⁽³⁾ followed.

Petition for revision of the order of Lala Gopal Das, Judge, Small Cause Court, Lahore, dated 10th May 1899.

Muhammad Shafi and Fazal Din, for petitioner.

Dharm Das, for respondent.

The judgment of the Court was delivered by

ROBERTSON, J. --The question in this case which in our opinion has to be decided is simply "should we interfere with the order of the lower Court on revision or not?" 21st Dec. 1900.

Two widows, it appears, were jointly entitled to certain rent from defendant; one of them is defendant's own sister. The other one sued alone for her half share of the rent and obtained a decree. It was pleaded that plaintiff could not sue without joining Mussammat Basant Kaur as co-plaintiff, and further that

⁽¹⁾ 79, P. R., 1888. ⁽²⁾ I. L. R., XX Bom., 250.

⁽³⁾ I. L. R., XVI All., 479.

she could not sue for half the rent only. The lower Court held that there was collusion between the other person, Mussammat Basant Kaur, who might have been joined as plaintiff, and the defendant, and decided that plaintiff could sue for her own share having made the co-right-holder a defendant. It is urged that such a suit would not lie, and when the case had come into Court the defendant's pleader offered to join as plaintiff if the whole rent was claimed. Several judgments were quoted to us to show that a suit by one sharer of a right to rent would not lie for his share only. (*Bindu Bashini Dasi v. Peari Mohun Bose* ⁽¹⁾, *Jogendro Chunder Ghose v. Nobin Chunder* ⁽²⁾, *Kashee Kishore Roy Chowdhry v. Alip Numdal* ⁽³⁾, *Manohar Das v. Manzul Ali* ⁽⁴⁾, *Parameswaran v. Shangaran* ⁽⁵⁾, *Tara Chander Banerjee v. Ameer Numdh* ⁽⁶⁾, *Jadoo Shat v. Kadumbinee Dasse* ⁽⁷⁾, *Prem Chand Noskur v. Mokshoda Debi* ⁽⁸⁾, *Murlidhar v. Ishri Prasad* ⁽⁹⁾, and *Badri Das v. Jawala Pershad* ⁽¹⁰⁾.) The general rule undoubtedly is against an action for rent being brought against a tenant by one of several co-sharers for such sharer's own share only. We doubt, however, if the authorities quoted go quite so far as to rule that under no circumstances can a suit be so brought, and the obvious collusion if defendant and co-sharer is not to be overlooked in considering a rule laid down for the tenant's benefit. But we do not consider ourselves called upon to go into this matter. The point is one of great nicety, we cannot say that the ruling of the lower Court is on the face of it wrong or illegal. It has been laid down by Mr. Justice Plowden in *Secretary of State for India in Council v. Mr. R. Johnson* ⁽¹¹⁾ that "it is not every "error of the subordinate Court that entitles a party to an order "from the Chief Court under Section 25. This is a jurisdiction, the "exercise of which is discretionary, and which should not be used "except to remedy injustice."

In the case of the *Poona City Municipality v. Ramji Raghunath* ⁽¹²⁾, which was an application under Section 25, Small Cause Court Act, it was laid down that the Bombay High Court was "slow to interfere under Section 25 when there are no substantial "merits in the case of the applicant. It interferes to remedy in- "justice. It is slow to interfere when substantial justice has "been done . . . though technically the plaintiff or defendant may "have a legitimate ground of attack or defence."

(1) I. L. R., XX Calc., 107.

(2) I. L. R., VIII Calc., 353.

(3) I. L. R., VI Calc., 149.

(4) I. L. R., V All., 40.

(5) I. L. R., XIV Mad., 489.

(6) 22, W. R., 394.

(7) I. L. R., VII Calc., 150.

(8) I. L. R., XIV Calc., 201.

(9) W. N., All., 1884, 181.

(10) 86, P. R., 1891.

(11) 79, P. R., 1888.

(12) I. L. R., XX Bom., 250.

The High Court of the North-Western Provinces in *Sarman Lal v. Khuban* ⁽¹⁾ went further still too far in the opinion of the Bombay Judges as regards the relative width of Section 25 of the Small Cause Court Act and Section 622 of the Civil Procedure Code. With the principles laid down in the rulings quoted above of this Court and the Bombay High Court, and to a considerable degree of the Allahabad High Court also, we find ourselves in entire accord. We do not think that it was ever contemplated to allow appeals on points of law under Section 25, and the present application is simply an appeal on a point of a law of great delicacy in regard to which we are unable to say under all the circumstances that the view of the lower Court is clearly and on the face of it incorrect. Still less do we see any reason to think that any injustice has been done. The person whom it is claimed should be joined as co-plaintiff, and who was joined as defendant, is the sister of defendant, and is apparently in collusion with him. It is not a case in which we think we should use our discretionary power of revision, and we accordingly decline to interfere. Application for revision dismissed with costs.

Application dismissed.

No. 20.

Before Mr. Justice Robertson and Mr. Justice Maude.

MAYA RAM,—(DEFENDANT),—APPELLANT,

Versus

SHIB DAS AND ANOTHER,—(PLAINTIFFS),—RESPONDENTS.

} APPELLATE SIDE.

Further Appeal No. 487 of 1898.

Hindu Law—Joint family—Presumption of joint ownership—Necessity for certificate—Succession Certificate Act, 1889, Section 4.

In a suit brought to recover certain money due on account of a balance struck by the defendant in favour of the plaintiffs' father, the plaintiffs had not obtained a succession certificate.

Held, that no certificate was necessary, as the plaintiffs were suing for a joint Hindu family property by right of survivorship.

Semble.—Act VII of 1889 does not require a Court to dismiss a plaintiff's suit where a certificate should have been but has not been obtained. Section 4 only enacts that in the absence of the certificate a decree shall not be passed. There is nothing to preclude the Court from staying proceedings and directing the plaintiffs to take measures to procure a certificate.

Joti Ram v. Mussammat Surasti ⁽²⁾ followed and *Rup Chand v. Basanta Mal* ⁽³⁾ explained.

⁽¹⁾ *I. L. R.*, XVI All., 476. ⁽²⁾ 13, *P. R.*, 1883.

⁽³⁾ 102, *P. R.*, 1889.

Further appeal from the order of Captain C. S. Martindale, Divisional Judge, Hoshiarpur Division, dated 22nd March 1898.

Beechey and Sangam Lal, for appellant.

Lal Chand, for respondents.

The judgment of the Court (so far as is material for the purposes of this report) was delivered by

14th Dec. 1900.

MAUDE, J.—The plaintiffs are Brahmins who carry on the business of bankers in the town of Dasulha, which contains some 7,000 inhabitants. Their suit is to recover certain money due on account of a balance struck by the defendant in favour of their father who is now dead, and the first objection raised by the defendant was that the plaintiffs were not members of a joint Hindu family, and could not sue until they had obtained a succession certificate empowering them to collect their father's debts. The learned Divisional Judge held that the plaintiffs followed Hindu Law and could sue without taking out a succession certificate. There is ample authority in the decisions of the High Courts, indeed it has not been denied before us, that a plaintiff does not require a certificate where his claim is for family property by right of survivorship, but in this case the contention is that in the Punjab no presumption can be raised that the plaintiffs were members of a joint Hindu family with their father, and that they have failed to prove affirmatively that such was their status. In support of this contention we have been referred to certain remarks of Mr. Justice Powell in the case of *Rup Chand and Ram Das v. Basanto Mal and Relu Mal* ⁽¹⁾, where the learned Judge observed that in the Punjab the true Hindu joint family is almost, if not quite, unknown. That observation was made with reference to the question whether in this Province, in spite of the rule of strict Hindu Law that a son cannot demand partition while his father is alive, disruptions of joint families could not occur without express and formal partition. The *dictum* can in no way be regarded as an assertion, much less a decision, that there are no joint Hindu families in the Punjab. On the contrary we have the authority of the learned Judges who decided the appeal in the case of *Joti Ram and another v. Mussammatt Surasti and others* ⁽²⁾ that it is settled law that the normal state of every Hindu family is joint, although this is only a presumption which of course is liable to be rebutted, and the degree of weight to be attached to it must depend upon the circumstances of each case. Here the plaintiffs are Brahmins, their father was carrying on a money-lending business in a Municipal town, and it is not denied that

⁽¹⁾ 102, P. R., 1889, 356. ⁽²⁾ 13, P. R., 1883.

the plaintiffs resided with him. They also produced three witnesses who deposed that the plaintiffs and their father carried on a joint business, and formed a joint family. We hold then that there was a joint Hindu family, and that the plaintiffs are suing for family property by right of survivorship. No succession certificate was therefore necessary. We also desire to point out that Act VII of 1889 does not require a Court to dismiss a plaintiff's suit where a certificate should have been but has not been obtained. Section 4 only enacts that in the absence of the certificate a decree shall not be passed. There is nothing to preclude the Court from staying proceedings and directing the plaintiff to take measures to procure a certificate.

(The other parts of this judgment are not material for the purposes of this report—Ed., P. R.)

No. 21.

Before Mr. Justice Harris.

FAKIRA,—(PLAINTIFF),—APPELLANT,

Versus

PIYARE LAL,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Further Appeal No. 41 of 1898.

Mortgage—Conditional sale—Foreclosure—Regulation XVII of 1806—Defects in notice issued under Section 8—Preservation of right of redemption on deposit of principal and interest within the year of grace—Regulation I of 1798, Section 2.

In a suit for possession of a house by redemption filed by the plaintiff a few days before the expiry of the year of grace, who had after the service of a notice of foreclosure admitted only Rs. 45 to be due and had deposited Rs. 63 as the amount of the balance of principal and interest due in the Court which had issued the notice, alleging that his father had paid an item of Rs. 395 out of the mortgage money, which payment he was unable to prove.

Held, that in a notice under Section 8 of Regulation XVII of 1806, where the mortgagor was especially referred to Section 7 of the Regulation, which lays down the steps which must be taken in order to redeem the property within the year of grace, the mere omission to specify the exact or uncertain amount of interest due or even to mention the interest at all or the fact that the words "District Judge" on the notice was impressed and not written, were not defects sufficient to vitiate the foreclosure proceedings.

Held, further, that the plaintiff was not entitled to a decree for redemption on any terms, his right to redeem having expired at the end of the year of grace as he had not complied with the requirements of Section 2 of Regulation I of 1798, he not having deposited even the total amount of

the principal due; nor taken either of the alternative courses open to him under Section 7 of Regulation XVII of 1806 within the year of grace.

Mehro v. Suja ⁽¹⁾, *Fatteh v. Sain Ditta* ⁽²⁾ referred to. *Forbes v. Ameroonissa Begum* ⁽³⁾ followed, and *Wasawa Singh v. Rura* ⁽⁴⁾ approved.

Further appeal from the order of S. Clifford, Esquire, Divisional Judge, Delhi Division, dated 21st May 1897:

Madan Gopal, for appellant.

Sangam Lal, for respondent.

The questions of law arising and the facts in connection therewith, sufficiently appear from the judgment of the learned Judge, which was as follows :—

12th Dec. 1900.

HARRIS, J.—By deed of the 17th August 1885 plaintiff's father (since deceased) mortgaged a house to defendant with possession for Rs. 460 by way of conditional sale. Under the terms of the deed interest was chargeable.

On the 23rd August 1895 defendant got a notice of foreclosure issued under Regulation XVII of 1806 to plaintiff, which was served on the 2nd September 1895. On the 21st July 1896 plaintiff filed an application in the Court which issued the notice alleging only Rs. 45 to be due, and on the 27th July 1896 he deposited in Court Rs. 63 as principal and interest due under the mortgage. That amount defendant refused to accept, and on the 25th August, *i.e.*, a few days before the expiry of the year of grace, plaintiff instituted the suit, out of which this further appeal has arisen, for possession of the house by redemption.

It was not contended in the Courts below that plaintiff's deposit was the actual sum sufficient for redemption, but it was alleged by plaintiff that his father had paid Rs. 395 towards the principal, and that only a small sum remained due.

The Courts concurred in finding that the Rs. 395 were not paid as alleged, and it is not here urged that the evidence is sufficient to sustain a finding that Rs. 395 were paid.

The first Court held that plaintiff was entitled to redeem, the notice proceedings being irregular, and found Rs. 543-1-3 due on the mortgage, and decreed redemption on payment of that sum.

The Divisional Judge on appeal held that the only defect in notice proceedings then urged, *viz.*, that the words "District Judge" were impressed and not written, was not a fatal defect vitiating the proceedings, and that the full amount due not having been paid or

⁽¹⁾ 84, P. R., 1882.

⁽²⁾ 76, P. R., 1877.

⁽³⁾ 10, Moo. I. A., 340; 5, W. R., P. C., 47.

⁽⁴⁾ 24, P. R., 1895.

tendered, the right to redeem lapsed on expiry of the year of grace. The suit was accordingly dismissed.

It is not here argued for plaintiff-appellant that the fact that the words "District Judge" were impressed and not written constitutes a defect vitiating the proceedings, but it is contended that the notice to plaintiff was defective in that it did not set forth the full amount of principal and interest due, but the principal only—Macpherson's *Law of Mortgage*, 7th Edition, pages 504-5, and *Mehro v. Suja* ⁽¹⁾ are cited in support of the argument. In the ruling cited it was held that a notice which did not bear the seal or signature of the District Judge, but only his initials, and merely notified to the mortgagor the principal sum due on the mortgage without any mention of the interest due thereon, was fatally defective and vitiated the foreclosure proceedings.

The question of waiver by the mortgagor of defects in the foreclosure proceedings is here raised by respondent. That question was discussed in *Mehro v. Suja* ⁽¹⁾, and the inapplicability of *Falteh v. Sain Ditta* ⁽²⁾ pointed out. It is true that in his application of the 21st July the mortgagor refers to the notice as claiming Rs. 630-3-9 as principal and interest. But that seems only to point to the mortgagor's knowledge that he had to pay interest. As the notice does not specifically mention interest and as defects were urged in the first Court, there cannot be said to have been waiver on the part of the mortgagor.

As to the words "District Judge" being impressed there appears no doubt as to the correctness of the ruling, *Wasawa Singh v. Kura* ⁽³⁾, that such was not a fatal defect.

The important words of the notice here in question are—
"chunki adalat haza men sail ne darkhwast baibat rihi katoi yane mukhtatim hojane bai tumhari jaidad ke ki jo tumne badast sail bazaria dastawez bai bilwafa tiadadi Rs. 460 muwarikha 17th August 1885 badin wajah guzri ki hasb shara'it dastawez mazkur bawojud hone takaza ki odaegi nahin hui ab tum ko notice dia jata hai ki jistarah dafa 7, Regulation yane kanun 17, 1806, men hukm hai tarikh tumil purwana haza se ek sal ke andar agur tum infikak rihi na karoge to rihi kotai baibat ho jawega."

It will be observed that in the above notice, though interest is not mentioned, it is specified that payment in accordance with the terms of the mortgage has not, though demanded, been made, and that the mortgagor is expressly referred to Section 7 of the Regula-

⁽¹⁾ 84, P. R., 1882. ⁽²⁾ 76, P. R., 1877.

⁽³⁾ 24, P. R., 1895.

tion which lays down the steps which he should take in order to redeem within the year of grace. In *Wasava Singh v. Rura* ⁽¹⁾ a reference to Section 7 of the Regulation was held to comply with the requirements of Section 8, which provides that it shall be notified to the mortgagor "that if he shall not redeem the property mortgaged in the manner provided for in the foregoing section within one year from the date of the notification the mortgage will be finally foreclosed and the conditional sale will become conclusive."

The notice is almost an exact translation of the above paragraph, and must be held to have complied therewith, and under these circumstances it was unnecessary to specify the exact or uncertain amount of interest due, or mention interest at all.

There was thus no defect vitiating the foreclosure proceedings.

It is further contended for appellant that as he brought his suit within the year of grace he is entitled to a decision on the merits as to what is due on the mortgage and to a decree for redemption on payment of that amount.

No authority has been cited for this contention, but it is urged that under Regulation I of 1798, of which Regulation XVII of 1806 is an extension, a deposit of principal and interest preserved to the mortgagor his right of redemption. It appears, however, that under Regulation I of 1798 where the lender (mortgagee) is in possession the deposit is, in order to preserve the right of redemption, to be the whole of the principal sum due, on deposit of which the interest account may be gone into.

In the present case the whole of the principal was not paid in by plaintiff. But the earlier regulation is governed by the later Regulation of 1806, which alone lays down the proceedings necessary to complete the mortgagee's title. The terms of Section 8 are imperative, and provide that the mortgagor shall redeem within the year in the manner provided for by Section 7, and if not the mortgage will be finally foreclosed.

In the leading case on these Regulations (*Forbes v. Ameeroonissa Begum* ⁽²⁾) their Lordships of the Privy Council on a consideration of the above mentioned Regulations held that when proceedings under Section 8 of Regulation XVII of 1806 have been had "it becomes incumbent on the mortgagor to take within the year the steps towards redemption which are prescribed by the 7th Section, within that period, he must either pay or tender (and the proof of such payment or tender will lie on him) the sum lent, or the balance

⁽¹⁾ 24, P. R., 1895.

⁽²⁾ 10, Moo. I. A., 340; 5, W. R., P. C., 47.

"due, if any part of the principal has been discharged, and also, in
 "the case in which the mortgagee has not been put in possession of
 "the mortgaged property, any interest that may be due; or (and
 "this is the alternative commonly adopted) he must make a deposit
 "pursuant to Section 2 of Regulation I of 1798."

It is quite clear, as remarked above, that the plaintiff did not comply with the requirements of Section 2 of the Regulation of 1798, as he did not deposit even the total amount of the principal due.

Their Lordships go on to say, "The general effect of these regulations is, that if anything be due on the mortgage and the mortgagor makes an insufficient deposit, and *à fortiori* if he makes no deposit at all, the right of redemption is gone at the expiration of the year of grace."

As plaintiff did not take either of the alternative courses open to him under Section 7 of Regulation XVII of 1806 within the year of grace he is not entitled to a decree for redemption on any terms, his right to redeem having expired at the end of that year.

For the above reasons I dismiss the appeal with costs.

Appeal dismissed.

No. 22.

Before Mr. Justice Reid.

SARDAR ALI SHAH AND OTHERS,—(DEFENDANTS),—
 APPELLANTS,

Versus

JIWAN SINGH,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Further Appeal No. 1366 of 1898.

Pre-emption—Notice to pre-emptors under Section 53 of the Tenancy Act, 1887—Waiver of right—Suit by pre-emptor as an occupancy tenant—Punjab Laws Act, 1872, Section 13.

Held, in a suit for pre-emption of an occupancy holding that a landlord who was also an occupancy tenant in the same village served with a notice under Section 53 of the Tenancy Act was at liberty to elect to claim pre-emption under either of his qualifications, and that his failure to proceed under the Tenancy Act did not bar him from resorting to the Civil Court, or constitute acquiescence or a waiver of his right.

Held also, that the absence of specification of price demanded in a notice under Section 53 prevents it being effectual under Section 13 of the Punjab Laws Act.

Further appeal from the order of A. E. Hurry, Esquire, Divisional Judge, Ferozepore Division, dated 7th April 1898.

Golak Nath, for appellants.

Oertel, for respondent.

The judgment of the learned Judge was as follows :—

24th Dec. 1900.

REID, J.—The only question for consideration is whether the plaintiff-respondent has waived his admitted right of pre-emption. The other grounds taken in appeal cannot be sustained and have not been pressed.

The respondent was a shareholder and an occupancy-tenant in the village in which the land in suit is situate, and he has claimed an occupancy holding of 47 *bighas* 11 *biswas* by pre-emption. The vendor applied to a Revenue Officer, under Section 53 of the Tenancy Act, to give notice to the shareholders in the village of his intention to sell, and fixed the price at Rs. 20 per *bigha*.

Notice, under Section 53, was served on the respondent on the 4th March 1895, but it did not contain any specification of the price demanded.

The respondent did not claim as a landlord, and on the 5th April 1895 the vendor sold his holding for Rs. 401-12-0 less than half the price originally demanded by him.

On the 2nd April 1896 the respondent instituted this suit, claiming as an occupancy tenant under Section 12 (f) or (g) of the Punjab Laws Act.

It is admitted that the vendor did not give notice to the respondent, under Section 13 of the Punjab Laws Act, through any Court, but counsel for the appellants contends that the notice under Section 53 was sufficient, the words used in Section 13 being “any Court” and a “Revenue Officer” being a “Court” for the purposes of the section.

Ude Ram v. Badhur Mal (1) is authority for the contention that notice issued through a Tahsildar, and stuck up in the *chaupal* of the village, is sufficient within the terms of Section 13, if it complies in other respects with the requirements of that section, but I concur with the learned Divisional Judge in holding that the absence of specification of price prevents the notice served under Section 53, being effectual under Section 13.

The next contention for the appellants is, that the respondent having failed to exercise his right as a landlord, is barred from claiming in any other capacity.

Now Section 53 affects only landlords, while under Section 13 an occupancy tenant may claim, and I see no reason against an individual who combines both qualifications, electing to claim under either.

(1) 90, P. R., 1887.

The conditions attaching to a suit for the establishment of a pre-emptive right differ widely from those attaching to the summary procedure provided for by Section 53.

In the present case the price originally fixed by the vendor was more than double the sum now admitted to be the market value, and this fact might well induce a pre-emptor to prefer a civil suit to the chance of an excessive price being fixed by a Revenue Officer.

Another consideration influencing his choice of a forum might be the fear that other pre-emptors would follow his example in claiming under Section 53.

The 3rd April 1896 was Sunday and rival pre-emptors had therefore only two days after the institution of the respondent's suit, within which to sue, had they wished to share in the pre-emptive right. It is a matter of common experience that the assertion of the right leads to suits by others, who are prepared to acquiesce in the original sale, but, for various reasons, wish to defeat the pre-emptor who has taken action. For these reasons, I hold that the failure to proceed under the Tenancy Act did not bar the respondent from resorting to the Civil Court. Counsel for the appellants further contends that the failure to proceed under the Tenancy Act, or to claim after notice, constitutes acquiescence and waiver of the right. Reliance is placed on *Abdul Rib v. Muhammad Ji* ⁽¹⁾ in which the opinion was expressed "that the act of attesting a deed of sale, if it be done by "a pre-emptor with the intention of relinquishing his own claim "may properly be held to be, within the meaning of *Phulel v. Buta* ⁽²⁾, a positive act discharging the vendor from the obligation of giving written notice to the pre-emptor, and waiving the "latter's right of pre-emption."

Now the attestation of a deed of sale, with the intention of relinquishing the attesting witness' claim, differs widely from mere abstention from claiming under Section 53, and in *Mula v. Nihal Chand* ⁽³⁾, it was held that a pre-emptor who had bid at an auction sale and was outbid, had not waived his right, but was entitled, upon the conclusion of the sale, to notice that he might have the property for the sum at which it was knocked down. In *Muhammad Salamat-ulla v. Jalal-ud-din* ⁽⁴⁾ the vendor sent the pre-emptor a notice, by post, calling on him to buy a house, if he wanted it, for Rs. 500. The pre-emptor not only did not accept the offer but refused to pay a smaller sum. It was held, following

(1) 8, P. R., 1882.

(2) 78, P. R., 1881.

(3) 52, P. R., 1880.

(4) 24, P. R., 1887.

Phulel v. Buta (1) and *Karam Khan v. Jang Baz Khan* (2) that the offer and refusal did not dispense with the necessity for a written notice, through the Court, required by Section 13. I cannot hold that any waiver or acquiescence has been established. The appeal fails, and is dismissed with costs.

Appeal dismissed.

No. 23.

Before Mr. Justice Robertson and Mr. Justice Maude.

APPELLATE SIDE. {

RAI BHOLA RAM,—(DEFENDANT),—APPELLANT,

Versus

RAI SETH CHAND MAL,—(PLAINTIFF),—RESPONDENT.

Further Appeal No. 317 of 1898.

Civil Procedure Code, 1882, Section 559—Joinder of respondents on appeal—“Interested in the result of appeal”—Meaning of—

A., B., C. and D. filed a suit for the recovery of certain moneys from the defendant. The first Court dismissed their suit *in toto*. From that decision all the plaintiffs appealed, but the Divisional Judge only accepted A.'s appeal, and rejected that of B., C. and D. The defendant filed a further appeal against the decree of the Divisional Judge. On the day of hearing an application was filed on behalf of B., C. and D. that they might be joined as respondents under Section 559 of the Code of Civil Procedure.

Held, that the petitioners were not “interested in the result of the appeal” within the meaning of Section 559 of the Code of Civil Procedure, as their claim had been disallowed by both the lower Courts, and they had not appealed and could not be granted a decree on an appeal against a decree in favour of a co-plaintiff, nor could any change be made in the order of dismissal passed against them.

Upendra Lal Mukerjee v. Girindra Nath Mukerjee (3), *Hudson v. Basdeo Bajpye* (4), and *Ram Ditta v. Mohkam* (5), referred to.

Further appeal from the order of F. Field, Esquire, Divisional Judge, Peshawar Division, dated 20th December 1897.

Madan Gopal, for appellant.

Ishwar Das, for respondent.

The judgment of the Court (so far as is material for the purposes of this report) was delivered by

23rd Nov. 1900.

ROBERTSON, J.—The first point to be noticed is an application put in by Mr. K. P. Roy, asking that Mussammat Lachmi and Mussammat Ram Ditti, and Mussammat Hukm Devi, who were

(1) 52, P. R., 1880. (3) I. L. R., XXV Cal., 565.

(2) 112, P. R., 1882. (4) I. L. R., XXVI Cal., 109.

(5) 46, P. R., 1892.

joined as plaintiffs in the suit in the first Court might be joined as respondents here. The first Court dismissed the suit *in toto*. From that decision all the plaintiffs appealed, and the appeal of Seth Chand Mal, plaintiff, was accepted, but that of the other plaintiffs was rejected. From that order, upholding the decision of the first Court dismissing the claim, Mr. Roy's clients have not appealed. The defendant, however, respondent before the Divisional Judge, has appealed, and the plaintiffs whose appeal was dismissed and who have not appealed seek to be made respondents with apparently, indeed avowedly, the object, if the appeal against Seth Chand Mal be accepted, of getting a decree themselves. This, however, it is quite clear they could not do. The matters in issue between them and the appellant have been decided against them by two Courts, and as they have not appealed it is quite clear that no alteration in the decision of the lower Courts as between them and the appellant could now be made in this Court. The application is made under Section 559, Civil Procedure Code, but it appears to us that that section applies to parties who *quâ* the suit may be interested in the result of the appeal, and that persons who *quâ* the suit itself could not be affected by the result of the appeal are not covered by the section. The decision in *Upendra Lal Mukerjee and others v. Girindra Nath Mukerjee and others* (1) was quoted to us in support of a contrary view, but in that case it was the co-defendants who had been exonerated who were made parties by order of the Court apparently of its own motion, and in the result the Court accepted the appeal of one set of defendants, and on their appeal passed a decree in favour of the respondent against the other defendants. This view was followed evidently with much hesitation in *Hudson v. Basdeo Bajpye*. (2) This is quite a different case from the present in which a plaintiff whose suit has been dismissed, and who has not appealed, seeks to be joined as respondent, for we are quite clear that the decision as between such plaintiff and an applicant respondent could not be affected by the result. Even if we were prepared to accept the views expressed in *Upendra Lal Mukerjee and others v. Girindra Nath Mukerjee and others* quoted above, which we are by no means prepared to say off-hand that we are ready to do, and from which the views expressed in *Ram Ditta v. Mohkam* (3) appear somewhat to differ, we are quite clear that a plaintiff whose suit has been dismissed and who has not appealed, could not be granted a decree on an appeal against a decree in favour of a co-plaintiff, nor could any change be made in the order of dismissal passed

(1) *I. L. R.*, XXV *Calc.*, 565. (2) *I. L. R.*, XXVI *Calc.*, 109.(3) 46, *P. R.*, 1892.

against him. This case is clearly distinguishable from the Calcutta case quoted. The applicants may have private reasons for desiring to see the decree in favour of Seth Chand Mal-maintained, but we do not see that that entitles them to be joined as respondents, the only result of which could be to subject the appellant to a double fire which could only be directed on the same point.

Under these circumstances we do not think that the applicants are "interested in the result of the appeal" within the meaning of Section 559, Civil Procedure Code, or that we ought to allow them to be joined as respondents, and we reject the application accordingly.

(The other parts of the judgment are not material for the purposes of this report—ED., P. R.)

No. 24.

Before Mr. Justice Robertson and Mr. Justice Maude.

BALDEO DAS AND OTHERS,—(DEFENDANTS),—

APPELLANTS,

Versus

PIARE LAL,—(PLAINTIFF),—RESPONDENT.

Further Appeal No. 786 of 1898.

Pre-emption—Sale for a certain specific purpose on certain specific terms—Pre-emptor how far bound by the terms in the deed.

Where the *bonâ fide* intention of a vendor and vendee was that certain land should be sold and bought for the purpose of the erection of a *dharam-sala* and that the sale should be cancelled on failure to fulfil this condition, and the plaintiff as a pre-emptor claimed to purchase without fulfilling the condition, alleging that it was not intended to be enforced and that he was not bound by the terms in the deed:

Held, that as there was nothing unusual or illegal in the arrangement and the conditions were *bonâ fide*, the pre-emptor must abide by the terms of the deed which had been offered and accepted by the vendee whom he wished to oust.

Further appeal from the order of S. Clifford, Esquire, Divisional Judge, Delhi Division, dated 22nd April 1898.

Madan Gopal, for appellants.

K. P. Roy and S. P. Roy, for respondents.

The judgment of the Court was delivered by

29th Nov. 1900.

ROBERTSON, J:—During the hearing of the appeal we intimated that in our opinion there was no proof of any sale having taken place before the date of the execution of the registered deed of sale, dated 2nd September 1896, and we have accordingly now only to

decide whether the plaintiff could be allowed a decree for pre-emption in face of the condition in the deed which recites that the sale shall be set aside in case the purpose for which the land in question was sold, *i.e.*, the erection of a *dharamsala*, was not carried out.

To clear the ground we must at once say that we are convinced that the *bonâ fide* intention of both parties to the transaction was that the land should be sold and bought for the purpose of the erection of a *dharamsala*. This does not seem to be seriously contested now, and whether it be contested or not, we consider it well established.

It is, however, contended for the respondent that even if it were so the condition arranging that the sale should be cancelled on failure to fulfil this condition was not one really intended to be acted upon, but was put in merely with a view to defeat the rights of the pre-emptor. Now the deed itself is a perfectly clear and straightforward one, and one which *primâ facie* must be taken to express the true intentions and objects of the parties. The parties are both of the same caste and sub-division. The deed recites that no convenient *dharamsala* exists for them, the vendor desires to sell and the vendee desires to buy for the purpose of building a *dharamsala*, and after reciting this fully in the main portion of the deed a further clause is added which provides that if this condition is not fulfilled the sale will be cancelled. It is suggested that the clause was put in at the vendee's suggestion to defeat pre-emptive claims, and we were asked to assume that if this were so it was not binding on the pre-emptor. This we are unable to accept. No doubt when a fictitious entry is made for this purpose, it would not be binding on a pre-emptor, as in the case when a sum is entered, as the purchase money in excess of the price really paid, but we are by no means prepared to say that if a vendee, especially anxious to secure certain property, says, "Your price is so much, "but in order to obviate pre-emptive claims I am prepared *bonâ fide* to add a certain sum and pay it *bonâ fide* as the price of any "preference, so that pre-emptive claims may be rendered less likely," and actually does so, a pre-emptor would be entitled to oust the vendee for any less sum than that actually paid. So here, no doubt, both parties were anxious that the land should be used for a *dharamsala* only, and were desirous of resisting claims for pre-emption. To secure the accomplishment of their object both *inter se* and against all comers, they entered certain conditions. If those conditions were *bonâ fide* ones, if the promise to build the *dharamsala* or return the land formed as it were *bonâ fide* part of the price, was it not a perfectly fair and reasonable condition, and one

which a pre-emptor is bound to respect? Whether the pre-emptor could claim to pre-empt on giving a promise to build a *dharamsala* is a question with which we are not concerned as he distinctly refuses to do so. We can see no reason for assuming that the condition was not a *bonâ fide* one, the main reason urged for this view being that the vendor's father went bankrupt some 16 months or so later—a fact which we think quite insufficient in itself. The whole deed taken as a whole is reasonable and consistent, and it lay upon the pre-emptor to show that any part of it was really otherwise than a *bonâ fide* transaction. We think he has quite failed to do so.

As for the contention that the pre-emptor is not bound by the condition in the deed that the sale will be cancelled if a *dharamsala* be not built, because that restriction in the use of the property is in itself a condition which would not be enforced, we are unable to accept it. The parties to the deed themselves are still quite willing to abide by it, and we fail to see anything unusual or illegal in the arrangement. The right of pre-emption is one to be interpreted strictly. It is not one which gives a pre-emptor a right to force a transfer from a vendor on terms which are quite unacceptable to the vendor, and in general a pre-emptor must abide by the terms which have been *bonâ fide* offered to and accepted by the vendee whom he wishes to oust. These we find on the facts that a vendor has in good faith sold his land for a certain specific purpose on certain specific terms to a vendee who is ready and willing to carry out his share in the contract, a third person wishes to oust the vendee and obtain the land in effect without paying a portion of the price, and that portion the non-payment of which was under the terms of the sale to render it void. We do not think that he can do this under the law of pre-emption as it stands in this Province, and we accept the appeal and dismiss the suit with costs throughout accordingly.

Appeal allowed.

No. 25.

Before Mr. Justice Clark, Chief Judge, and Mr. Justice Reid.

FATTEH SINGH AND ANOTHER,—(DEFENDANTS),—
APPELLANTS,

Versus

NIHAL SINGH,—(PLAINTIFF),—

BASANT SINGH,—(DEFENDANT),—

RESPONDENTS.

} APPELLATE SIDE.

Further Appeal No. 429 of 1898.

Custom—Alienation—Alienation by a childless adopted son of his adoptive father's property—Distinction between the right to alienate the property acquired from adoptive and a natural father.

Held, that under the Customary Law of Punjab the right to alienate ancestral property is the same whether the property dealt with comes from a natural or an adoptive father, the only distinction which exists between the estates of the adopted son in the two classes of property is with reference to the devolution of each on his death, childless and without a widow.

Further appeal from the order of A. Kensington, Esquire, Divisional Judge, Jullundur Division, dated 9th February 1898.

Madan Gopal, for appellants.

Sohan Lal, for respondents.

The facts of this case fully appear from the judgment of the Chief Court, delivered by

REID, J.—The plaintiff-respondent sued for a declaration 14th Dec. 1900.
that a sale for Rs. 800 of land inherited by the vendor from his adoptive father, a collateral of the plaintiff, did not affect the reversionary rights of the plaintiff.

The Court of first instance found that Rs. 545 were raised for necessary purposes and constituted a charge on the estate.

The lower Appellate Court reversed this decree, except as to Rs. 200 admitted by the plaintiff to have been raised for necessity, on the ground that although the vendor might have required the whole or part of the Rs. 800 for expenses of his own and for payment to a creditor, it was admitted that he owned a share with his brothers in an ancestral holding of his own, in a village about a mile from that in which the land in suit is situate, besides a share in an occupancy holding in another village, and that under these circumstances, he was not justified in saddling land, in which he had a life-interest only, with his personal debts, even supposing them to be proved.

No authority has been cited, either by the learned Divisional Judge, or by the pleader for the respondent, for the proposition that, under Customary Law which admittedly governs the parties, an adopted son takes an estate in the property of his adoptive father more limited than that which he takes in the property of his natural father, or for the proposition that any distinction between the right to alienate the property acquired from either father can be drawn.

The pleader for the respondent referred vaguely to Hindu Law, but no analogy can be drawn from that Law, inasmuch as an adopted son usually loses his rights in his natural family, unless he is a *dwyā mushyayona*, in which case the adoptive father is almost invariably the brother of his natural father.

Under Customary Law the right to alienate ancestral property is limited, and the rules of limitation are the same whether the property dealt with comes from a natural or an adoptive father.

In neither class of property has the son "a life-interest only," if those words are used as signifying the estate of a tenant for life, although it is true that he cannot, except under certain circumstances, alienate for a period extending beyond his own life. The only distinction which exists between the estates of the adopted son in the two classes of property is with reference to the devolution of each on his death, childless and without a widow. In that event the male collaterals through the natural and the adoptive fathers take the property derived from those fathers respectively. In suits of the description under consideration the rights of the alienee must be considered. His duty is to ascertain whether money is required for necessity, in the sense in which that word has been interpreted under Customary Law, and it is not his duty to ascertain on which of two funds the sum required for that necessity is to be a charge. We cannot import a doctrine akin to marshalling into the Customary Law on this subject.

As we cannot hold that the custom, apparently set up by the learned Divisional Judge for the respondent, has been established, it is necessary to consider what portion, if any, of the balance of the sale consideration was raised for necessity or is binding on the reversionary right of the respondent as a collateral of the alienor, treating the property acquired by the latter from his natural and adoptive fathers as one estate, chargeable with debts which bind the estate in the hands of collaterals after the death of the alienor.

We set aside the decree of the lower Appellate Court, and, under Section 562 of the Code of Civil Procedure, we remand the appeal to that Court for disposal on the merits, with reference to the above remarks.

Appeal allowed: cause remanded.

No. 26.

Before Mr. Justice Robertson and Mr. Justice Maude.

ALI MUHAMMAD AND ANOTHER,—(DEFENDANTS),—
APPELLANTS,

Versus

DULLA,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Further Appeal No. 1390 of 1897.

Custom—Alienation—Will—Will in favour of daughter's son—Awans of Shahpur District—Competency of proprietor to make a will in favour of his daughter's son in presence of his own brother.

Held, that the right to make a bequest by a will exists among the Awans of the Shahpur District, and that a bequest by a sonless proprietor in favour of his daughter's son is valid by custom in the presence of his own brother.

Further appeal from the order of Rai Bahadur Lala Buta Mal, Divisional Judge, Jhelum Division, dated 17th November 1897.

Oertel and Muhammad Shaffi, for appellants.

Ganpat Rai, for respondent.

The judgment of the Court was delivered by

ROBERTSON, J.—The facts are set forth in the judgments of the lower Courts. 4th Dec. 1900.

It is found as a fact that one Manga executed a will in favour of his daughter's sons, Khan Muhammad and Ali Muhammad, and on a consideration of the evidence we think there is no doubt that this conclusion is correct. The point indeed was not argued before us.

The question we have to determine therefore, is whether or not such a will is valid by custom among the Awans of the Shahpur District. It is well established that among the Awans the power of alienation is in excess of that which the Courts have held to exist among other tribes, and it would certainly appear that Manga would have had the power to make such a disposition of his property by gift during his life-time. The real contention of the respondent is that there is a wide and essential distinction between alienation by will and alienation by gift, and that even if the power to alienate by gift is conceded, it does not follow that

there is a power to alienate by will, and that as a matter of fact no such power exists in this case.

As regards the power of alienation by will, it is remarkable that in the *Rivaj-i-am* for Shahpur prepared at the last Settlement, all tribes declared in the most unequivocal manner that the power to bequeath by will existed and was recognized, and this answer has all the more force because it was entirely opposed to the preconceived views of the officer who recorded it, and who was clearly very reluctant to accept it. In our opinion, however, if there is any value at all in these answers recorded in statements of custom, apart from support by legal decisions, it lies in the spontaneous statement by the tribes themselves at a time when there is no dispute to bias them of what they consider to be their own customs even when those statements are not quite in accordance with any general theory of tribal custom which may have been evolved elsewhere. In this case the officer recording the answer has noted that there is no true custom in any tribe of making wills, but he adds that it is growing, and is least rare among Awans and Hindus, and it is added that if the true spirit of tribal custom is to be followed no will should in any circumstances be held binding on the heirs. In our opinion the true spirit of tribal custom is neither more nor less than the custom which is proved to exist, and we should not in coming to a conclusion on this point be swayed too much by general theories on the subject. So far it is clear that the people themselves are unanimous in stating that the custom does exist. We next turn to consider the authorities on the subject.

Until a comparatively recent period it was generally recognized that there was no distinction between the power of making an alienation by will and making one by gift. The proposition is thus expressed in Sir William Rattigan's Digest.

"The Customary Law ordinarily recognizes no distinction between the power of making verbal or written transfer of property *inter vivos*. Nor, *semble*, where an unrestricted power of transfer is recognized to exist, between a transfer *inter vivos* and one to take effect after death."

It is, however, urged that this view has been over-ruled by later decisions of this Court, and we proceed to consider the judgments quoted by the counsel for the respondent in support of this view, and as regards the power of Awans to make wills.

The first of these is *Muhammad Khan and others v. Atar Khan and others* (1). The first point we notice is that in that case there

was undoubtedly a genuine will made. The will was not held to be binding in that case, the parties to which were Awans of Bannu, it being held that no custom had been proved giving the Awans of Bannu a special power of making a will. That will would have been invalid by Muhammadan Law, and the case is not one which has much bearing on the present one.

The next case quoted was *Hayat Muhammad and another v. Fazl Ahmad and another* ⁽¹⁾, but in that case the parties were Awans of the Rawalpindi District, and all that was held was that in that district a sonless Awan could not alienate the whole estate to his grand-nephews in presence of his brothers.

The next case is that of *Bahadar and another v. Mussammat Bholi and others* ⁽²⁾. In that case it was not held definitely that an Awan of the Jhelum District could make no disposition of his property by will, but that "he had not the power to make a will leaving the whole of his property to his daughter in the presence of a full brother." Of course the power to make a will subject to the ordinary customary restrictions in transfer and the power of unrestricted dispositions of property by will are quite different things, and it is possible to reject the latter while accepting the former. The *Rivaj-i-am* in that district was against the powers of making wills. The next case is that of *Mukarrab v. Fatta and another* ⁽³⁾. The parties in that case were also Awans of the Jhelum District, and here again it was clearly proved that a will had been executed. The judgment again does not appear to go so far as to say that no will would be valid, but, "that it had not been established that the testator was competent to leave by will his share of the tenancy which is ancestral property held jointly with the plaintiff, to Fatta, in the presence of the former, the rightful reversioner." Some remarks made lower down by Mr. Justice Chatterji in that judgment may be quoted here: "There is an essential distinction between gifts which take effect *inter vivos* and are followed by possession and wills which come into force after death and in which of course there is no transfer of possession in the life-time of the testator. The right of testation is a much later development of the right of the disposition of property by the owner, and cannot be assumed merely from the existence of the power of transfer by gift. It is unknown among archaic communities of simple agriculturists, who, as a rule cling pertinaciously to tribal rights in land." We shall recur to this view of the subject later on.

⁽¹⁾ 52, P. R., 1892. ⁽²⁾ 108, P. R., 1893.

⁽³⁾ 88, P. R., 1895.

The next case quoted is *Sher Muhammad and others v. Phula and others* ⁽¹⁾, but the question of testamentary disposition did not arise in that case. It was held there that among the Awans of the Khushab *tahsil* of the Shahpur District there exists a very wide power of alienation by gift. The next case quoted is that of *Ghulam Muhammad and others v. Abbas Khan and others* ⁽²⁾. In that case, however, the power of disposition by will was not fully gone into, and the learned Judges remarked that it was not necessary to decide the point definitely, although the Judges appeared to lean to the opinion that at least a will, which varied the ordinary rules of succession in such a case as that before them, would probably be held invalid. In that judgment, however, certain views expressed in Roe's *Tribal Law* at pages 124 and 125 are quoted. At page 124 of that book it is stated that "the devolution of property by will is not only unknown, but is necessarily "opposed to the fundamental principles of the Customary Law," and these words were quoted to us in this case by counsel for respondent.

We are not, however, able to express our concurrence with the statement of fact contained in the first part of that dictum. So far from devolution of property by will being unknown we have in the cases quoted by the learned counsel for the respondent alone a succession of cases in which the execution of wills has been clearly proved, and the Courts are constantly occupied in discussing the validity of such dispositions. Such a disposition may be contrary to the complete theory of Customary Law as expounded in that text-book, but the people themselves constantly resort to such dispositions as is proved by the multitude of cases which come into Court alone. Some of these are supported, some are not, but that they are commonly enough resorted to is certain. Another authority, Sir William Rattigan, remarks in his Digest, at page 56 of the 5th Edition: "A power of testation has everywhere followed the "conveyance of property *inter vivos*, and it is not met with in "primitive societies for the reason that it is not a power which "depends upon the custom of the kin, but upon the law of the State. "(Thus in the Roman Jurisprudence the law regulating testamentary disposition was a part of the *jus publicum* and not of the *jus "privatum*). So also in this Province although at the period of our "conquest wills were practically unknown the subsequent practice "has so far sanctioned the power to execute such instruments that "it is too late now to deny its existence. . . . although the "power of testation is a later development than the power of "alienation *inter vivos*, yet where the latter is once clearly and fully

(1) 9, P. R., 1890. (2) 22, P. R., 1899.

“recognized in a community the introduction of the former is inevitable, and is soon acquiesced in as a necessary element in the law of property.”

These views appear to us to be worthy of careful consideration. We quite agree that in certain communities there may be a distinction between the power of gift and of testation, but it is a difference rather in degree than in kind, and is the result of the greater uncertainty in the one case than in the other. While it is the duty of our Courts to respect all well established custom it is surely not to be held that progress is never to be recognized, or that developments inseparable from civilization are to be rigidly disregarded. It appears to us that seeing that testation is recognized by the law of the land when it is clearly shown that a large power of alienation exists, and that the community within which it exists asserts a corresponding power of disposition by will, the mere fact that before the complete introduction of law and order wills were not made because to make them was futile, seeing that the testators could not insure their being carried out, is not sufficient ground upon which to hold that the custom is not recognized now. Many of the earlier judgments of this Court took this view clearly, and we have consulted a large number on both sides (*viz.*, *Anokha v. Mohan Lall* ⁽¹⁾, *Jowala Singh v. Dal Singh* ⁽²⁾, *Vir Singh v. Hardit Singh* ⁽³⁾, *Ganesha v. Ganpat* ⁽⁴⁾, *Mussammat Ghulam Fatima v. Mussammat Maqsudan* ⁽⁵⁾, *Suchet Singh v. Banka* ⁽⁶⁾, *Mansabdar v. Sadur-ud-din* ⁽⁷⁾, *Umar v. Mussammat Sahib Khatum* ⁽⁸⁾, *Sheru v. Saghar* ⁽⁹⁾, *Inter alia Pertab Singh v. Bishen Singh* ⁽¹⁰⁾, and *Gujar v. Sham Das* ⁽¹¹⁾); and we do not think that there is anything even in the later judgments which debars us from recognizing the validity of wills when those concerned have asserted the existence of this power unequivocally, and clearly possess a wide power of alienation.

In this case we find that the Awans of Shahpur have very wide powers of alienation, we find them asserting resolutely the existence of the power of testation, and we find that such powers have undoubtedly been put in exercise. We are unable to hold that we are entitled to deny this power to them upon any general theory of what may have been the custom at a different stage of their development. We accordingly find that the right of testation exists among the Awans of the Shahpur District.

(1) 2, P. R., 1870.

(2) 12, P. R., 1877.

(3) 128, P. R., 1888.

(4) 198, P. R., 1889.

(5) 69, P. R., 1890.

(6) 90, P. R., 1891.

(7) 10, P. R., 1892.

(8) 76, P. R., 1892.

(9) 83, P. R., 1895.

(10) 81, P. R., 1877.

(11) 107, P. R., 1887, (F. B.)

We do not think, however, that it can be contended that the power to dispose of property by will exceeds the power to alienate by gift, and we have therefore further to discuss whether the provisions of the will, which is in favour of the testator's daughter's son, is valid in presence of testator's brother.

Of the authorities quoted to us *Kalaandar Khan and another v. Ata Ulla and others* (1) is a case of Pathans in Peshawar, and has no bearing on this case. The case of *Sher Muhammad and others v. Phul and others* (2), already quoted, is strongly in favour of the unrestricted power of alienation among Awans of the Khushab *tahsil* of Shahpur in favour of a daughter, daughter's son, sister, sister's son, son-in-law or agnate to the exclusion of other agnates in the absence of male lineal descendants. In that judgment the cases *Shah Wali v. Mussammat Panna Bibi* (3), *Wolli v. Jivan* (4), *Ahmad Khan v. Mussammat Ghulam Bibi* (5), and *Aulia v. Ali* (6), and other unreported judgments were quoted and considered. *Devi Das v. Bhakhra* (7) was a case of Awans in the Bannu District in which an unrestricted power of sale was found to exist by a childless proprietor. *Nura v. Tora* (8) was a case in which it was held that among Awans of the Tallagang *tahsil* of the Jhelum District a gift by a childless proprietor in favour of his wife's sister's son was valid by custom. The answer of the Awan tribe given at page 71 of Wilson's *Customary Law of Shahpur* is unequivocal. "A father having no son or son's son "has full power, to give the whole of his immovable property to "his daughter, daughter's son, sister, sister's son or son-in-law, or "to one of his agnate heirs without the consent of the other "agnates."

These authorities make it clear that the testator had the power to make the alienation in question in favour of his daughter's sons, *inter vivos*, and we accordingly find that the will in question was a valid disposition of the testator's property. We therefore accept the appeal and dismiss the suit with costs throughout.

Appeal allowed.

(1) 44, P. R., 1897.
 (2) 9, P. R., 1899.
 (3) 133, P. R., 1890.
 (4) 33, P. R., 1891.

(5) 36, P. R., 1891.
 (6) 49, P. R., 1898.
 (7) 53, P. R., 1899.
 (8) 46, P. R., 1900.

No. 27.

*Before Mr. Justice Harris.*DAMODAR DAS AND ANOTHER,—(PLAINTIFFS),—
APPELLANTS,*Versus*MUNICIPAL COMMITTEE, DELHI,—(DEFENDANT),—
RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 1191 of 1897.

Punjab Municipal Act, 1891, Sections 92 and 95—Erection of a building—Bridging over a drain—Distinction between—Conditional sanction.

The plaintiffs having applied to the Municipal Committee for permission to roof over the drain in front of their gates, the Municipal Committee by a resolution which was passed more than five months after the date of the application agreed to allow the drain to be roofed, provided that the plaintiffs execute an agreement disclaiming all title to a piece of land between the drain and their compound wall. The plaintiffs in the meanwhile had roofed the drain, and as they did not execute the agreement relinquishing their right to the land between the drain and their compound wall, the Municipal Committee issued a notice to them to remove the roofing over the drain. The plaintiffs sued for an injunction to restrain the threatened demolition and justified their acts under clause 5 of Section 92 of the Municipal Act, inasmuch as the Committee had neglected to pass orders on their application within six weeks.

Held, that Section 92 was not applicable to the case, for though the bridging of the drain came within the meaning of erection of a building in Section 92, that section is governed in the matter of building over a drain by Section 95, and so the written permission of the Municipal Committee was necessary.

But, *held* further, that the imposed condition was *ultra vires* and that the plaintiffs were entitled to the injunction. The Municipal Committee while acknowledging that there was no objection to the erection was not empowered to compel the applicant to do something quite foreign to the object of the application and to the purpose and object for which the power of sanction was given.

Matsudi Mal v. Municipal Committee, Baiwani ⁽¹⁾, *Nagar Valab Narsi v. The Municipality of Dhanuhuku* ⁽²⁾, *Badri Das v. Municipal Committee, Delhi* ⁽³⁾, *Chopal Buta v. The Municipal Committee of Simla* ⁽⁴⁾, and *Ollivant v. Rahmatulla Nur Muhammad* ⁽⁵⁾, referred to.

Further appeal from the decree of S. Clifford, Esquire, Divisional Judge, Delhi Division, dated 28th June 1897.

Beechey and Dhanpat Rai, for appellants.

Madan Gopal, for respondent.

⁽¹⁾ 6, P. R., 1891, Cr.⁽³⁾ 90, P. R., 1898.⁽²⁾ I. L. R., XII Bom., 490.⁽⁴⁾ 24, P. R., 1890, Cr.⁽⁵⁾ I. L. R., XII Bom., 474.

The judgment of the learned Judge was as follows :—

26th March 1900.

HARRIS, J.—The material facts will be found stated in the judgments of the Courts below.

Plaintiffs are owners of a plot of land, formerly *nazul* property, by purchase in 1893, from Government, with consent of the Delhi Municipality, in which body the property was vested as being within Municipal limits in Civil Lines.

The boundaries and conditions in the notice of sale were accepted by the purchasers.

The road formed the boundary to the south and east, and by one of the conditions attached on those sides “ten feet from edge of drain” were “to be excluded for roadside trees, &c., (*sic*).”

Plaintiffs constructed two houses on their plot, the compound walls to east and south of which were duly built ten feet from the edge of the drain, and they made four gates for access to the said houses.

On 12th November 1894, plaintiffs applied to the Municipal Committee for permission to roof the drain in front of their gates, to construct a foot-path over the ten feet space, and to remove two trees in front of one of the gates.

No order was passed on the application until the 29th April 1895. In the meanwhile plaintiffs had roofed the drain and built wing walls to the ways over the drain, while the Municipal Committee had removed one of the trees referred to in the application. It seems also that the continuation of the wing walls into the road had been removed as obstruction.

It appears from the Committee's resolution of the 29th April 1895, that the recommendation of the Ward Committee which had inspected the spot was accepted, and that the roofing of the drain should be permitted, but the resolution made the sanction conditional on the plaintiffs executing an agreement whereunder they should disclaim all title to the ten feet space defined above.

As plaintiffs did not execute such agreement the Committee issued notice to plaintiffs to remove the roofing over the drain.

Plaintiffs thereupon sued for an injunction to issue to the Defendant-Committee to restrain the threatened demolition.

The Defendant-Committee pleaded that no sanction, except on a condition unfulfilled by plaintiffs, was ever given, that the roofing of the drain was without permission, and plaintiffs were not entitled to an injunction.

The first Court held the application of 12th November 1894 to be one under Section 92 of the Act (XX of 1891), and that as no order was passed thereon within six weeks sanction must be deemed to have been given, that the ten feet space was the property of plaintiffs, and the Municipality were not justified in demanding the execution of an agreement, the demand being unreasonable, and the conditions imposed not being one contemplated under Section 92 of the Act, and Bye-law 23.

A perpetual injunction was decreed to restrain interference with the construction "so far as plaintiffs continue to act in accordance with conditions imposed by the Act and the Bye-laws."

On appeal by defendant, the Divisional Judge held, that the ten feet space had not been sold to plaintiffs, that the section of the Act applicable is Section 95 and not Section 92, that no sanction was given except on a condition which had not been fulfilled, and that consequently the Committee rightly ordered demolition. The appeal was accepted and plaintiffs' claim dismissed. But the Divisional Judge granted a certificate for further appeal on the question whether the Committee could attach conditions to their sanction.

On the point of the plaintiffs' title to the ten feet space, which seems to me only relevant so far as it affects the reasonableness of the condition imposed by the Committee, I am at one with the Divisional Judge. Counsel for plaintiffs here goes so far as to urge the property of his clients in the drain, but that cannot be considered part of the road, and it appears absurd to suppose property in the roadside drain was intended to pass.

Looking at the circumstances surrounding the sale, indefinite nature of boundaries, the want of precise ascertainment of area, the building of plaintiffs' compound walls beyond the ten feet space and the improbability of the reservation being only for the planting of trees, I think, the condition as to exclusion of ten feet from the edge of the drain, was meant to exclude, in the minds of the parties to the sale that width from the plot and to include it in the road.

The next point, *viz.*, whether the application of the 12th November 1894 comes within Section 92 or Section 95 of the Act, is of more importance as regards the decision of this cause. For if the application comes under Section 92 then, subject to other sections, the neglect or omission of the Committee to pass any order thereon within six weeks of receipt of the application amounted to an absolute sanction (sub-section (5)), and having given sanction the

Committee had no authority to withdraw that sanction (*Matsadi Mal v. Municipal Committee, Bhiwani* ⁽¹⁾) but in my opinion though the bridging of the drain comes within the meaning of erection of a building in Section 92 (Section 94 clearly not including every form of erection or re-erection) that section is governed in the matter of building over a drain by Section 95, and the written permission of the Committee was necessary. There was no written permission until the resolution of the 29th April 1895 was passed, or at least none has been produced though plaintiffs were challenged to produce such sanction. The cutting of one tree was no such. Nor can I accede to the argument that the sanction given was unqualified. The resolution is badly worded, but it is clear enough that it meant the execution of the agreement to be a condition precedent to the sanction.

The remaining question for consideration is only that certified by the Divisional Judge, *viz.*, whether the defendant-Committee could impose such a condition. In other words was their action *ultra vires* and unreasonable or as expressed in *Nagar Valab Narsi v. The Municipality of Dhandhuka* ⁽²⁾ (cited for appellants) was the Committee's authority exercised "in a capricious, wanton and "oppressive manner"? If the Committee were acting *bonâ fide* and within their powers there can be no doubt they are not liable to the control of a Civil Court, and plaintiffs are in that case not entitled to the injunction sought (*Budri Das v. Municipal Committee, Delhi*, ⁽³⁾, citing *Chippal and Buta v. The Municipal Committee of Simla* ⁽⁴⁾). But it is necessary to determine whether the Committee in imposing the condition in question were exercising a power given for the object of Section 95. In *Ollivant v. Rahmatulla Nur Muhammad* ⁽⁵⁾, at page 478, it is said that "where powers "are given by the Legislature to interfere with private property "those powers are to be exercised strictly and exclusively for the "purposes and objects for which they are given, and unless it can "be shown that such interference is necessary for the furtherance of "those objects it will not be permitted."

In this case it has not even been alleged that the bridging of the drain, the extension of the wing walls into the road having (as mentioned above) been demolished, in any way contravenes the objects of the section in question. The Committee are quite willing the bridges shall remain, and indeed those bridges are essential for the purpose of access to the houses constructed by the plaintiffs, but the Committee wish to exercise their power of

⁽¹⁾ 6, P. R., 1891, Cr.

⁽²⁾ 90, P. R., 1898.

⁽³⁾ I. L. R., XII Bom., 490.

⁽⁴⁾ 24, P. R., 1890, Cr.

⁽⁵⁾ I. L. R., XII Bom., 474.

sanction in order to force from the plaintiffs an admission of the Committee's title to another piece of land.

That the Committee have, as I have held, such a title probably saves their action from being described as "capricious and wanton," and gives some show of reason to their proceedings. It could not, however, have been contemplated that a Municipal Committee, while acknowledging that there is no objection to the erection, is empowered to seize the opportunity to compel the applicant to do something quite foreign to the object of his application, and to the purpose and object for which the power of sanction was given.

I hold, therefore, that the imposed condition was *ultra vires* on the part of the Committee, and that the plaintiffs are entitled to the injunction in the form decreed by the first Court.

I accept the appeal, and setting aside the order of the Divisional Court, I restore the decree of the first Court. Under the circumstances, I order defendant to bear half the costs incurred by plaintiffs throughout.

Appeal allowed.

No. 28.

Before Mr. Justice Maude.

MUSSAMMAT SARDARI,—(DEFENDANT),—APPELLANT,

Versus

CHIRANJI LAL AND ANOTHER,—(PLAINTIFFS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 736 of 1899.

Mortgage—Conditional sale—Foreclosure—Regulation XVII of 1806—Validity of notice of foreclosure of mortgage.

Held, that it is not essential to the validity of a notice under Section 8 of Regulation XVII of 1806, that the actual wording of the Regulation should be reproduced in it *verbatim*.

Miscellaneous further appeal from the decree of A. E. Hurry, Esquire, Divisional Judge, Ferozepore Division, dated 2nd April 1899.

Lajpat Rai, for appellant.

Madan Gopal, for respondents.

The judgment of the learned Judge was as follows :—

MAUDE, J.—The appellant's contention is, that the notice of foreclosure was informal, because in it the mortgagor was told to "pay off" the mortgage debt instead of being directed to "redeem" the mortgage. Otherwise admittedly the notice was in proper form. The Regulation provides that, that the notice should notify to the mortgagor "that if he shall not redeem the

5th Dec. 1900.

“property mortgaged” the mortgage will be finally foreclosed. No doubt the Courts have been very strict in requiring that the provisions of the Regulation shall be strictly complied with, but I am not aware of any decision to the effect that the actual wording of the Regulation must be reproduced in the notice *verbatim*. The repayment of the mortgage debt means the redemption of the mortgage, and the notice issued in this instance fully informed the mortgagor of what he had to do under the provisions of the Regulation. I observe also, that the point now raised was not raised in the first Court. I reject the appeal with costs.

Appeal dismissed.

No. 29.

Before Mr. Justice Robertson and Mr. Justice Maude.

APPELLATE SIDE. {

SARWAR AND ANOTHER—(PLAINTIFFS),—APPELLANTS,

Versus

SADULLA AND OTHERS—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 1479 of 1898.

Jurisdiction—Partition proceedings by the Revenue authorities—Jurisdiction of Civil Court to entertain subsequent suit for a declaration, that certain land was the plaintiffs' exclusive property—Punjab Land Revenue Act, 1887, clauses (1), and (2), XVII, of Section 158.

Held, that a suit for a declaration of right inconsistent with the allotment of land made by a Revenue Officer can be brought in a Civil Court after a partition has been formally completed, provided that the suit involves a question of title in any of the property affected by the partition proceedings and that Chapter IX of the Land Revenue Act does not bar the jurisdiction of the Civil Court where the point of joint ownership is disputed.

Ahmad Gul v. Bostan (1), referred to, and *Bachan Singh v. Madhan Singh* (2), followed.

Further appeal from the decree of F. Field, Esquire, Divisional Judge, Peshawar Division, dated 27th June 1898.

Ishwar Das, for appellants.

Shireore and Muhammad Shaffi, for respondents.

The judgment of the Court was delivered by

7th Dec. 1900.

MAUDE, J.—In this case the plaintiffs sued for a declaratory decree to the effect that they are the proprietors of certain land, of which they alleged they were in possession; they stated, however, that in the Revenue records the defendants had been entered as proprietors. The plaintiffs based their claim to proprietary

(1) 118, P. R., 1894.

(2) 61, P. R., 1897.

right on the allegation that the land had been purchased many years previously by one of their ancestors, and that it had ultimately descended to them. The defence was that the land in dispute was not the property of the plaintiffs, but that it was part of the *shamilat deh*, and that it had been allotted to the defendants in the course of formal partition proceedings carried out by the Revenue authorities. The Munsif held that the land was not the area purchased by the plaintiffs' ancestor, that it was part of the *shamilat deh*, and that it had been regularly allotted to the defendants on partition. The plaintiffs appealed to the Divisional Judge, who dismissed their appeal not, however, on the grounds assigned by the Munsif, but because he held that the jurisdiction of the Civil Courts was barred by Section 158, clause (1) of the Punjab Land Revenue Act of 1887. The reasons given for this decision are, that the plaintiffs had agreed to the partition of the *shamilat* land of the village, and that when one of the defendants had put in an application under Section 122 of the Act for possession of the share allotted to him the plaintiffs had failed to raise any objection. Therefore, the learned Divisional Judge held, that as the plaintiffs had failed to oppose the partition instrument they could not bring a civil suit, the jurisdiction of the Civil Court being barred by Section 158 (1) of the Act. In support of this decision the case of *Ahmad Gul and others v. Bostan and others* ⁽¹⁾, has been cited in the Divisional Judge's judgment.

It does not appear to us that the decision of this Court above cited was altogether analogous to the present case, but it is unnecessary to discuss this point, inasmuch as, that decision was overruled by a Full Bench of this Court in the case of *Bachan Singh v. Madhan Singh and others* ⁽²⁾. The question discussed in the later ruling included the effect of Section 158 of the Land Revenue Act, with reference to the correct meaning of the words in clause (2) (XVII) "not being a question as to title in any of the property, of which partition is sought," and the judgments delivered are, we consider, ample authority for holding that a suit for a declaration of right inconsistent with the allotment of land made by a Revenue Officer can be brought in a Civil Court after a partition has been formally completed, provided the suit involves a question of title in any of the property affected by the partition proceedings. In the present instance there undoubtedly is such a question of title and, therefore, in our opinion Section 158 (2), (XVII), does not bar the jurisdiction of the Civil Court.

⁽¹⁾, 118, P. R., 1894.⁽²⁾ 61, P. R., 1897.

But it has been contended on behalf of the respondents that the suit was dismissed by the Divisional Judge as being barred by clause (1) of Section 158, and that the Civil Court had no jurisdiction, because the matter in suit was one which a Revenue Officer was empowered by the Act to dispose of. In this connection our attention has been invited to the provisions of Chapter IX of the Act relating to partition. It is sufficient, however, to observe that the provisions of the Land Revenue Act as regards partition refer to land *jointly owned*, whereas the contention of the plaintiffs in the present case is, that the land in suit was never jointly owned by the defendants, but is the plaintiffs' sole property, and that, therefore, the Revenue authorities had no power to include it in the partition. We are unable thus to see that Chapter IX of the Act in any way bars the jurisdiction of the Civil Court.

We accept the appeal, and remand the case to the Court of the Divisional Judge, under Section 562 of the Code of Civil Procedure, for a decision of the appeal on the merits. The costs of this appeal will follow the event.

Appeal allowed : cause remanded.

No. 30.

Before Mr Justice Harris.

JODHA,—(PLAINTIFF),—APPELLANT,

Versus

DHANI RAM AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Civil Appeal No. 134 of 1900.

Absentee—Abandonment—Abandonment of land—Extinguishment of proprietary rights.

Where the plaintiff's father left the village before 1869 and neither he nor plaintiff made any claim for, or interested themselves in, the land of which they had been recorded as owners until he brought this suit in 1899, when he was some 40 years of age.

Held, that these facts constituted a clear abandonment and were not affected by the promise recorded by the defendant in the settlement of 1869, but not repeated in the revised settlement of 1879, that they would restore the property on the return of the absentee to the village.

Mehr Chand v. Duni Chand (1), *Kasu v. Langar* (2), *Das v. Maya Das* (3), *Lakha Singh v. Gurmukh Singh* (4), *Sain Ditta v. Ghulaman* (5), and *Fazal Din v. Shah Mohammad* (6), referred to.

(1) 18, P. R., 1886.

(4) 62, P. R., 1890.

(2) 84, P. R., 1888.

(5) 85, P. R., 1892.

(3) 118, P. R., 1889.

(6) 141, P. R., 1883.

APPELLATE SIDE. }

Further appeal from the decree of S. Clifford, Esquire, Divisional Judge, Hoshiarpur Division, dated 7th December 1899.

Sakh Dial, for appellant.

The judgment of the learned Judge was as follows :—

HARRIS, J.—This is an abandonment suit, most of the facts are stated in the judgments of the Courts below, and need no repetition. 3rd Jan'y. 1901.

The facts appear to be that some time previous to the settlement (*tahsil* Una) of 1869, (*Sambat* 1926) plaintiff's father left the village (Ambota) and settled in the Kapurthalla State, where he died, leaving Jodha, plaintiff, and other minor sons. At the settlement of *Sambat* 1926, plaintiff was living in another village with his maternal grandfather. An entry was then recorded by the defendant-co-sharers that they would restore, after calculation of profit and loss, the share to the absentees or their offspring, on their return to the village. Jodha took service, and seems only recently to have returned to the village, but he made no claim to share until he brought this suit in 1899, when he was some 40 years of age.

The evidence in support of the usual allegation that plaintiff has enjoyed his share of the produce is meagre, and is amply rebutted by the presumption arising from the *girdawari* records.

It appears quite certain that after Jodha's father left the village before 1859, neither he nor Jodha made any claim for, or interested himself in, the ancestral share.

In the revised settlement of 1879, the entry above referred to was not repeated, and Jodha was shown as an absentee.

Each abandonment case has to be decided on its own set of facts, and none of the cases cited for plaintiff (*Mehr Chand v. Duni Chaml* (1), *Kasn v. Langer* (2), *Das and Hukman v. Maya Das* (3), and *Lakha Singh v. Gurnukh Singh* (4)) here, is on all-fours with the present case, and the principle laid down in *Sain Ditta v. Ghulam* (5) is here inapplicable, for if there was abandonment, such was much further back than 12 years before suit.

The case is one, in which I consider, there was a clear abandonment even before *Sambat* 1926, and as pointed out in *Fazal Din v. Shah Muhammad* (6), "the presumption, arising from long continued absence and the omission to take steps to keep alive a once existing

(1) 18, P. R., 1886.

(2) 84, P. R., 1888.

(3) 118, P. R., 1889.

(4) 62, P. R., 1890.

(5) 85, P. R., 1892.

(6) 141, P. R., 1883.

"right, that the absentee has relinquished all claims to his land, is
 "not affected by a promise on the part of the person in possession
 "of the land to restore it on the return of the absentee to the village."
 That plaintiff should reside in the village and yet delay his claim
 points still more strongly to abandonment, than if he had returned
 and claimed the land at once on his return. Thus, no argument
 in plaintiff's favour can be deduced from the fact that he has been
 living for some time in his father's old house in the village.

For the above reasons, I am of opinion, that the claim has
 been rightly dismissed.

I dismiss the appeal with costs.

Appeal dismissed.

No. 31.

Before Mr. Justice Robertson and Mr. Justice Maule.

APPELLATE SIDE.

MAWASI AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

MAYA RAM AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 1063 of 1899.

"Land Suit"—Punjab Courts Act, 1884, Section 3—Punjab Tenancy Act, 1887, Section 4.

The plaintiff sued to demolish a building erected by the defendant and to restore to its original condition the site which the plaintiff described as having been used for pasturing cattle, but which no doubt had been enclosed by a wall when the plaint was filed.

Held, that the suit was a "land suit" within the meaning of Section 3 of the Punjab Courts Act, 1884, the true principle for a decision whether, a suit is a "land suit" being to have regard to the character and use of the land at the time immediately before the cause of action has arisen. The use to which the defendant may have devoted the land after the cause of action has arisen is immaterial as determining the nature of the suit brought to contest his wrongful appropriation of it.

Hayat v. Sant Ram (1), referred to.

Further appeal from the decree of A. E. Hurry, Esquire, Divisional Judge, Ferozepore Division, dated 12th August 1897.

Harris, for appellants.

K. P. Roy and S. P. Roy, for respondents.

The facts of this case sufficiently appear from the judgment of the Chief Court, delivered by

12th Jan'y. 1901.

MAULE, J.—The question for decision by the Bench is whether the suit is a "land suit" within the meaning of Section 3 of the

(1) 20, P. R., 1894.

Punjab Courts Act, for if it is not, a further appeal does not lie to this Court. The plaint describes the land in dispute as "*uftada* "*ghairmumkin sirf waste charhane o aram karne o abnoshi* "*mauweshian*," which clearly implies that the land had been used for pasturing cattle. Section 4, clause (1), of the Punjab Tenancy Act, defines "land" as meaning "land which is not occupied as the "site of any building in a town or village, and is occupied or has "been let for agricultural purposes, or for purposes subservient to "agriculture, or for pasture, and includes the sites of buildings and "other structures on such land." *Primâ facie* then, it would appear, that the present suit in which the prayer is that the land may be restored to its original condition, is a "land" suit. It has been contended, however, by the learned pleader for the respondents, that the area in dispute had been enclosed by a wall when the plaint was filed, and that what must be regarded is not the purpose for which the land may once have been occupied or used, but the actual condition of it at the time when the suit was instituted, and in support of this contention much stress has been laid on a ruling of this Court in the case of *Hayat v. Sant Ram* (1). That decision at first sight, no doubt, appears to support the view put forward, for the learned Judge (Sir M. Plowden) observed in his judgment that "in applying the definition (*i.e.* of land) to a "land suit we think the time to be looked at is the time when the "suit is instituted." But a perusal of the entire judgment leaves little doubt in our minds that the learned Judges were then considering a somewhat different proposition from that involved in the present case, and that they were combating the argument that if land could be shown to have been used at any previous period for agricultural purposes, it must for all subsequent time be held to be "land" within the meaning of the definition. We are wholly unprepared to admit that the ruling cited is any authority for holding that, whether a suit is a "land suit" or not, may be a question to be arbitrarily decided by a defendant according to the nature of his own wrongful act, which affords the cause of action against him. The true principle, as we conceive, is to have regard to the character and use of the land at the time immediately before the cause of action has arisen; the use to which the defendant may have devoted the land after the cause of action has arisen is immaterial as determining the nature of the suit brought to contest his wrongful appropriation of the land. We hold, then, that the present suit is a "land suit," and that a further appeal lies to this Court. The appeal may now be disposed of on its merits by a single Judge.

 (1) 20, P. R., 1894.

No. 32.

Before Mr. Justice Reid and Mr. Justice Robertson.

SHAMAN,—(DEFENDANT),—APPELLANT.

Versus

SUNDAR AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Civil Reference No. 10 of 1900.

Jurisdiction—Suit for pre-emption—Value of suit—Courts of Appeal—Punjab Courts Act, 1884, Section 39.

Plaintiff sued for pre-emption of a house sold for Rs. 150 to the defendant on the allegation that the actual sale consideration and the market value were Rs. 82. The relief sought was a decree for possession of the house subject to payment of Rs. 82 or the market value or such sum as the Court might fix. The first Court (Munsif, 2nd class) found the market value to be Rs. 82 and decreed the claim. The vendee appealed to the District Judge who returned the appeal for presentation to the Divisional Court, the latter, considering the question of jurisdiction a doubtful one, submitted the case to the Chief Court, under Section 617, Civil Procedure Code.

Held, that as it could not be affirmed upon the plaint that the value of the suit did not exceed Rs. 100, the appeal lay to the Divisional Court and not to the District Judge.

Hazara Singh and others v. Lal Singh and others ⁽¹⁾, *Muhammad Khan v. Ashak Muhammad Khan* ⁽²⁾, and *Haider Khan and others v. Ali Akbar Khan and others* ⁽³⁾, followed.

Case submitted by Captain G. C. Beadon, Divisional Judge, Jullundur Division, on 9th November 1900, under Section 617 of the Civil Procedure Code, for orders of the Chief Court.

The facts of the case and the question referred to are fully set forth in the order of the Chief Court, which was delivered by

17th Juny. 1901.

REID, J. This is a reference under Section 617 of the Code of Civil Procedure. The plaintiff instituted a suit for possession of a house, ostensibly sold for Rs. 150 to the defendant, on the allegations that he had the right to pre-empt, and that the actual sale consideration and the market value were Rs. 82. The relief sought was a decree for possession of the house subject to payment of Rs. 82, or the market value or such sum as the Court might fix.

The question referred is whether the appeal from the decree of the Court of first instance, a Munsif's, lies to the District or to the Divisional Court.

⁽¹⁾ 63, P. R., 1891.⁽²⁾ 106, P. R., 1895 (F. B.).⁽³⁾ 18, P. R., 1897.

If the value of the suit, which is unclassified, exceeds Rs. 100, the appeal lies to the Divisional Court. The suit was valued, for purposes of jurisdiction and Court-fee at Rs. 82, and that sum was found by the Court of first instance to be the market value, the sale consideration being found to have been fixed in bad faith.

The authorities in point are *Hazara Singh and others v. Lal Singh and others* (1), *Muhammad Khan v. Ashak Muhammad Khan* (2), and *Haider Khan and others v. Ali Akbar Khan and others* (3).

The first of these may appear, at first sight, to be in conflict with the others, but this is not so, the judgment of the Full Bench in the 1895 case running thus: "The last cited case" (*Hazara Singh and others v. Lal Singh and others* (1)), "was one for redemption of a house, on payment of Rs. 43-12-0, or such other sum as the Court might determine. The suit being an unclassified suit, the question was whether the appeal lay to the District Judge, or to the Divisional Judge, under Section 39 of the Punjab Courts Act. It was held that, as it could not be affirmed upon the plaint, that the value of the suit did not exceed Rs. 100, the appeal lay to the Divisional Judge and not to the District Court. In our opinion the same principle must be applied to the present case.

"As it cannot be affirmed upon the present plaint that the suit exceeds Rs. 5,000, the appeal lay to the Divisional Court and not to the Chief Court."

The suit before the Full Bench was for redemption of a share of a mortgage for a total sum of Rs. 10,500, the plaint alleging that Rs. 2,000, more or less, were due on the share of which redemption was sought, and the relief sought was a decree for redemption on payment of any sum found to be due. The defendant pleaded that Rs. 10,000 were due, and the Court of first instance found the sum to be Rs. 7,558, and decreed redemption on payment of that sum. The Divisional Court entertained an appeal by the plaintiffs and reduced the sum due to Rs. 3,850. In *Hazara Singh and others v. Lal Singh and others* (1), the suit was for redemption of a share of property mortgaged on payment of Rs. 43-12-0 or such sum as might be found due. The defence was that Rs. 681-12-0 were due, and the Court of first instance decreed redemption on payment of Rs. 63-14-0.

(1) 63, P. R., 1891. (2) 106, P. R., 1895 (F. B.).

(3) 18, P. R., 1897.

The defendants appealed to the District Court, on the plea, that the sum due was Rs. 681-12-0, and the presiding Judge found that Rs. 136-14-3 were due and returned the appeal for presentation to the Divisional Court, on the ground that his jurisdiction was limited, in unclassified suits, to Rs. 100. The judgment of the Divisional Bench ran thus: "This" (the prayer for redemption on payment of such sum as the Court might determine,) "we consider is undertaking to submit to a decree on payment of any sum the Court might fix, up to, but not exceeding Rs. 500, the pecuniary limit of the jurisdiction of the Court Now, upon the amended plaint, it cannot be said that the value of the suit does not exceed Rs. 100, when that can be affirmed, but not otherwise, the District Judge is the Court of Appeal; when the District Judge is not the Court of Appeal the Divisional Court is If the jurisdiction is to be determined, as we think it is, with reference to the claim made, and not to the decision of the claim, when once the appeal has been properly instituted in the Divisional Court, it is immaterial that that Court finds less than Rs. 100 to be due, and the finding does not oust its jurisdiction."

The rule deducible from these judgments is, in our opinion, that laid down in *Haider Khan and others v. Ali Akbar Khan and others* ⁽¹⁾.

"The Divisional Court is pre-eminently the Court of first appeal, the limitations to its jurisdiction being confined to the cases mentioned above" (those contained in Section 39 (a) and (b) of the Punjab Courts Act). Section 39 (c) gives the Divisional Court jurisdiction in appeals from decrees passed in original suits by Munsifs, Subordinate Judges or District Judges, except where the course of appeal is governed by clause (a) or clause (b) of the section, and those clauses only apply where it can be affirmed upon the plaint, in an unclassified suit, either (a) that the value of the suit does not exceed Rs. 100, or (b) that the value of the suit does exceed Rs. 5,000. Our answer to the reference is that the District Court has not, and that the Divisional Court has, jurisdiction to entertain the appeal.

⁽¹⁾ 18, P. R., 1897.

No. 33.

Before Mr. Justice Harris.

RAM AND ANOTHER,—(DEFENDANTS),—APPELLANTS,

Versus

PIR BAKHSH,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 708 of 1900.

Common land—Gora-deh—Erection of kotha by non-proprietary resident with the permission of a proprietor in possession—Absence of special damage.

A non-proprietary was allowed by one of the proprietors of the village to build a *kotha* on a portion of the *gora-deh* which he (the proprietor) had previously used himself as a cattle pen. The plaintiff, another proprietor in the village, sued for demolition; the defendant and the consenting proprietor admitted that on the vacation of the site by them it would revert to the whole proprietary body.

Held, that in the absence of proof of substantial damage to the plaintiff his suit must fail, as he had not proved that he had ever exercised any specific rights over the site, or that the consenting proprietor had disposed of more than would fall to his share on partition or that the alienation was a permanent one.

Hidayat Ali Khan v. Basit Ali Khan ⁽¹⁾ followed; *Paras Ram v. Sherjit* ⁽²⁾, *Shadi v. Anup Singh* ⁽³⁾, *Najju Khan v. Intiaz-ud-din* ⁽⁴⁾, *Soheil Singh v. Abdulla* ⁽⁵⁾, *Har Sarup v. Hanwanta* ⁽⁶⁾, *Amin Chand v. Dasaundha Singh* ⁽⁷⁾, *Ghulam Muhammad Khan v. Buta* ⁽⁸⁾, and *Kanakayya v. Narasimulu* ⁽⁹⁾, referred to.

Further appeal from the decree of Kazi Muhammad Aslam Khan, C.M.G., Divisional Judge, Jhelum Division, dated 9th February 1900.

Ganpat Rai, for appellants.

Dhanraj Shah, for respondent.

The judgment of the learned Judge was as follows:—

HARRIS, J.—Plaintiff, who is one of numerous proprietors in 16th Jany. 1901. the village, sued for demolition of a *kotha* built by defendants Nos. 1 and 2, who are non-proprietary residents, on one *marla* of the *gora-deh*. The other proprietors who did not join in the suit were made *pro formâ* defendants. The facts, on which the Courts below apparently agreed, are that this portion of the village site was once occupied by a village *kamin* who lived in a hut thereon, that he vacated the site, the hut fell down, and the site was then used

⁽¹⁾ 54, P. R., 1892.

⁽²⁾ I. L. R., IX All., 661.

⁽³⁾ I. L. R., XII All., 436.

⁽⁴⁾ I. L. R., XVIII All., 115.

⁽⁵⁾ 78, P. R., 1877.

⁽⁶⁾ 7, P. R., 1885.

⁽⁷⁾ 54, P. R., 1886.

⁽⁸⁾ 187, P. R., 1889.

⁽⁹⁾ I. L. R., XIX Mad., 38.

by the sons of Sharfu, proprietors in the village, as a cattle pen; that in August 1898 the sons of Sharfu allowed defendants Nos. 1 and 2 to build the *kotla*, of which plaintiff sued for the demolition, on the site.

The first Court held that plaintiff was not entitled to demand demolition in the absence of proof of material injury to him, as the sons of Sharfu had the right of disposing of their share in common land, and dismissed the claim.

On appeal the Divisional Judge did "not altogether agree with the view held" by the first Court "as the rulings quoted" (chiefly *Hidayat Ali Khan v. Basit Ali Khan* ⁽¹⁾) and rulings "cited therein) do not apply to the present case," and considered that the principle laid down by the first Court would lead to permission being given "to others to occupy the whole of the *gora-deh*," and that the action of the sons of Sharfu was injurious to the interest of other proprietors; and so a decree was given for demolition.

There can be no doubt as to plaintiff's *locus standi* in bringing this suit, even though, as is clear in this case, he is actuated by enmity.

But if plaintiff has to prove substantial damage to himself, his suit must fail, for he is said to live some way off, and it is not asserted that he has ever exercised any specific rights over this site, or that the sons of Sharfu have disposed of more than would fall to their share on partition. It is also to be remarked that the sons of Sharfu, defendants, and defendants Nos. 1 and 2 have expressly admitted in their pleas that on the vacation of the site by defendants Nos. 1 and 2 the site will revert to the whole proprietary body.

The Divisional Judge cited no authority for the position taken up by him. But here counsel for respondent has sought to support the decree on the ground that the principle enunciated in *Hidayat Ali Khan v. Basit Ali Khan* ⁽¹⁾ is incorrect, and the ruling *Paras Ram v. Sherjit* ⁽²⁾, on which the ruling of this Court was partly based, has been dissented from in *Shadi v. Anup Singh* ⁽³⁾, and *Najju Khan v. Imtiaz-ul-din* ⁽⁴⁾. Respondent's counsel also cited *Soheil Singh v. Abdulla* ⁽⁵⁾, *Har Sarup v. Hanwantla* ⁽⁶⁾, *Amin Chand v. Dasaundha Singh* ⁽⁷⁾, *Ghulam Muhammad Khan v. Buta* ⁽⁸⁾, and *Kanakayya v. Narasin*

(1) 54, P. R., 1892.

(2) I. L. R., IX All., 661.

(3) I. L. R., XII All., 436.

(4) I. L. R., XVIII All., 115.

(5) 78, P. R., 1877.

(6) 7, P. R., 1885.

(7) 54, P. R., 1886.

(8) 187, P. R., 1889.

Nulu (1). I have referred to those authorities. The Madras case is entirely inapplicable. The Allahabad Full Bench ruling, *Shodi v. Anup Singh* (2) is distinguishable from *Paras Ram v. Sherjit* (3), and only covers the case of a permanent alienation for which plaintiff could not be adequately compensated by partition, i.e., where plaintiff has sustained substantial injury. That is indeed the same principle as is laid down in our own Punjab rulings, none of those cited being contrary to the view expressed in *Hidayat Ali Khan v. Basit Ali Khan* (4). If it required the unanimous vote of the whole proprietary body to settle a non-proprietary resident, whether shopkeeper, tenant or *kamin*, in the village there would be no non-proprietary village residents at all. I have no hesitation in following *Hidayat Ali Khan v. Basit Ali Khan* (4) in this case. There has been no permanent alienation, and plaintiff has suffered no injury.

I set aside the decree of the Divisional Court as bad in law, and restore the order of the first Court dismissing the claim. Plaintiff will bear all costs.

Appeal allowed.

No. 34.

Before Mr. Justice Reid and Mr. Justice Robertson.

RAO,—(PLAINTIFF),—PETITIONER,

Versus

HAR DIAL AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} REVISION SIDE.

Civil Revision No. 1173 of 1898.

Registration of decree of Civil Appellate Court in Revenue Appellate Court—Punjab Tenancy Act, 1887, Section 100.

Where a suit, cognizable by a Revenue Court only, had been instituted in and decided by a Civil Court, the decree of which had been affirmed by a Civil Appellate Court.

Held, that, inasmuch as the parties did not appear to have been prejudiced by the mistake as to jurisdiction, the proper course to adopt was to order that the decree of the Civil Appellate Court be registered in the Revenue Appellate Court.

Petition for revision of the decree of Captain C. S. Martindale, Divisional Judge, Hoshiarpur Division, dated 8th February 1898.

Sohan Lall, for petitioner.

The judgment of the Court was delivered by

REID, J.—We can find nothing in Section 100 of the Tenancy Act to prevent the registration of the decrees of Civil Appellate

(1) *I. L. R.*, XIX *Mad.*, 38.

(2) *I. L. R.*, XII *All.*, 436.

(3) *I. L. R.*, IX *All.*, 661.

(4) 54, *P. R.*, 1892.

17th Jan'y. 1901.

Courts in Revenue Appellate Courts, in cases in which it appears to this Court that the suit instituted in and decided by a Civil Court was cognizable by a Revenue Court only and an appeal from the decree passed by that Civil Court has been decided by a Civil Appellate Court, provided that the parties do not appear to have been prejudiced by the mistake as to jurisdiction.

Such a course obviously saves the time of the Courts, and we direct that the decree of the Divisional Judge of Hoshiarpur be registered in the Court of the Collector of Kangra.

The parties will bear their own costs of this Court, the respondents being unrepresented by counsel.

No. 35.

Before Mr. Justice Chatterji and Mr. Justice Maule.

KHUDA YAR AND OTHERS,—(DEFENDANTS),—
APPELLANTS,

APPELLATE SIDE. {

Versus

WAHAB DIN AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

Civil Appeal No. 1284 of 1898.

Jurisdiction—Suit for declaration—Value of subject-matter—Suits Valuation Act, 1887, Section 11.

Held that a suit for a declaration that certain land was *shamilat a'ch* and liable to partition can only be adjudicated upon by a Court of competent powers with reference to the value of the entire estate, and that Section 11 of the Suits Valuation Act is not applicable where the valuation has been fixed by rules having the force of law. The value of the land in dispute at thirty times the *jama* being Rs. 7,212-14-6, the first Court, a Subordinate Judge of the 2nd class, was not competent to try the suit.

A question of jurisdiction has to be noticed and decided if it is patent on the record although the ground was not urged in the Lower Appellate Court nor raised in the memorandum of appeal in this Court.

Gurga Sahai v. Sheo Lal ⁽¹⁾ followed. *Bullah Mal v. Bhupa Mal* ⁽²⁾ distinguished. *Linsch Chander Roy Chaudhury v. Sarnomoy Debi* ⁽³⁾, *Gunamuni Dasi v. Mahabharat Ghosh* ⁽⁴⁾, *Krishnasami v. Kamakasabai* ⁽⁵⁾, and *Muthusami Mudaliar v. Nallakulanthu Mudaliar* ⁽⁶⁾ referred to.

Further appeal from the decree of D. O. Johnstone, Esquire, Divisional Judge, Lahore Division, dated 29th August 1898.

Oertal, for appellants.

Muhammad Shaffi, for respondents.

⁽¹⁾ 132, P. R., 1894.

⁽²⁾ 110, P. R., 1888.

⁽³⁾ 1, Calc., W. N., 1886.

⁽⁴⁾ 1, Calc., W. N., XXIII.

⁽⁵⁾ I. L. R., XIV Mad., 183.

⁽⁶⁾ I. L. R., XVIII Mad., 419.

The judgment of the Court was delivered by

CHATTERJI, J.—This is a suit for a declaration that 2,773 *kanals* 16 *marlas* of land at *muza* Sagian *Kalanwar* in the Lahore *tahsil* and district are *shamilat deh* and liable to partition. 18th Jany. 1901.

The first Court dismissed the suit, but the Divisional Judge gave plaintiffs a decree in full.

The point now raised for the defendants before us is that the suit was, as respects its money value, beyond the jurisdiction of the first Court, and that all the proceedings are *ultra vires*. This ground was not urged in the lower Appellate Court and is not taken in the memorandum of appeal, but being a question of jurisdiction has to be noticed and decided if it is patent on the record.

The value of the land at thirty times the *jama* is Rs. 7,212-14-6 according to the rules framed by the Local Government under the Suits Valuation Act, 1887. The suit is, however, for a declaratory decree not possession, but this makes no difference in the value for purposes of jurisdiction. The Court cannot pass a binding declaration with respect to the nature of the land, *viz.*, whether it is the joint property of the whole village or the separate ownership of the persons severally in occupation of different portions of it unless it has competent powers of adjudication with reference to the value of the entire land. The declaration is asked with respect to the whole land and not with reference only to the plaintiffs' shares in it. The argument of respondents' counsel based on the analogy of a suit for partition has therefore no bearing and the Full Bench decision in *Ballah Mal v. Bhup Mal* ⁽¹⁾ no application.

Another argument urged on behalf of the respondents is that under Section 11 of the Suits Valuation Act, the question cannot be raised at this stage as it was not urged before, and that in any case the Court can only act under the provisions of subsection (3) and cannot otherwise interfere with the decrees of the Courts below.

We do not think this contention sound. We are of opinion as laid down in *Gunga Sahai v. Sheo Lal* ⁽²⁾ that Section 11 applies only where questions of "overvaluation or undervaluation" arise and is limited to cases in which the valuation depends on the parties or the Court and is not applicable where the valuation is fixed by rules having the force of law. Here there is no question

⁽¹⁾ 110, P. R., 1888.

⁽²⁾ 132, P. R., 1894.

as to valuation which is fixed by the rules framed by the Local Government at thirty times the *jama*. We do not consider Section 11 was intended to abolish the doctrine of jurisdiction *qua* the powers of the Court with regard to the value of the subject-matter of adjudication and to lay down that objections to the Court's jurisdiction in this respect cannot be entertained once it has been exercised, for the 3rd clause merely provides that where the objection has been taken in due time and is made out on the record and has prejudicially affected the decision of the case, the Court of appeal will take no other action except sending it to a Court of competent jurisdiction when a fresh trial or a further inquiry is found necessary. If the respondents' argument is right the result is that the limitation of the powers of the different grades of Courts is so much lost labour as practically any Court can try any suit and a Munsif with powers up to Rs. 100 can give a binding decree regarding property worth a *lakh* of rupees. It must also be held that a radical change has thus been made in the law of *res judicata* as regards competency of jurisdiction. We do not think such a tremendous change in the pre-existing law was intended by this section. The object of the section appears to be simply to set at rest disputes regarding undervaluation or overvaluation. There is nothing in *Dinesh Chander Roy Chaudhury v. Sarnamoyi Debi* ⁽¹⁾, *Gunnamuni Dasi v. Mahabharat Ghosh and others* ⁽²⁾, or *Krishnasami v. Kanakasabai* ⁽³⁾, or *Muthusami Mudaliar v. Nailakulantha Mudaliar* ⁽⁴⁾, which definitely lays down a contrary principle.

There remains the question whether the Court of first instance was competent to entertain a suit of the value of Rs. 7,212-14-0. It appears from Punjab Government Notification No. 1336 A., dated 23rd October 1897, that Muhammad Sarfaraz Khan, who tried this case as such Court, was thereby appointed Additional District Judge of Lahore, and in letter No. 1336 B., forwarding a copy of the above to the Deputy Commissioner of Lahore for his information, it was intimated that the ordinary civil powers to be exercised by Muhammad Sarfaraz Khan were to be limited to those of a Sub-Judge of the second class. Thus that officer was competent to try Civil suits up to the value of Rs. 5,000 and this was not affected by his appointment as Additional District Judge, see *Mussammat Nekhan v. Muhammad Khan and others* ⁽⁵⁾. He possessed the powers of a Sub-Judge of the 2nd Class before the date of the Notification, and on 16th June 1897 he

⁽¹⁾ 1, *Calc.*, W. N., 136.

⁽²⁾ 1, *L. R.*, XIV *Mad.*, 183.

⁽³⁾ 1, *Calc.*, W. N., XXIII.

⁽⁴⁾ 1, *L. R.*, XVIII *Mad.*, 419.

⁽⁵⁾ 46, *P. R.*, 1898.

brought it to the notice of the District Judge that the cognizance of this case was beyond his competency, but the District Judge erroneously overruled him on the ground that the suit was merely for a declaratory decree and not for possession and that plaintiff had therefore valued it at Rs. 1,100 in his plaint. The original valuation in the plaint however was at thirty times the *jama*, and though this was afterwards altered to Rs. 1,100 it is immaterial as the true value was that which was first put and this apparently had not been changed when the reference to the District Judge was made.

We hold therefore that the first Court was not competent to try the suit. We accordingly set aside the decrees of the lower Courts and order the return of the plaint to the plaintiff for presentation in the Court of the District Judge. Parties will pay their own costs up to date.

Appeal allowed.

No. 36.

Before Mr. Justice Chatterji and Mr. Justice Maude.

BANK OF BENGAL,—(PLAINTIFF),—APPELLANT,

Versus

DIN DIAL AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 571 of 1900.

Contract—"Undue influence"—*Contract Act (IX of 1872), Section 16.*

In a suit upon a registered mortgage deed where the defendants (mortgagors) pleaded undue influence and in support of their plea were only able to prove that to this extent pressure had been put upon them to execute the mortgage deed as security for the payment of a debt, namely, that a choice had been given to them of executing the deed or being at once put into Court,

Held, that such pressure did not amount to "undue influence" within the meaning of Section 16 of the Indian Contract Act as amended by Act VI of 1899. In order to reap the benefit of that section it was necessary for the defence to establish that the executants of the deed were induced to sign it because the plaintiff was in a position to dominate their will and had used that position to obtain an unfair advantage over them.

Sital Prasad v. Parbhu Lal (1) distinguished.

*First appeal from the decree of Lala Aya Ram, District Judge,
Delhi, dated 26th March 1900.*

Kirkpatrick, for appellant.

Girdhari Lal, for respondents.

(1) *I. L. R., X All.*, 535.

The facts of the case are fully set forth in the judgment of the Court which was delivered by

22nd Jany. 1901.

MAUDE, J.—In this case the Bank of Bengal sued thirteen defendants to recover the sum of Rs. 98,869-7-6, and also prayed for a declaration that certain immoveable property mortgaged to the plaintiff by three of the defendants should be held liable for the satisfaction of the amount due. These, the first three defendants, were Din Dial, Shimbhu Dial and Jai Dial, proprietors of the firm of Moti Ram Jamna Das, who drew the *Hundi*s sued upon. The fourth defendant is the official receiver of the estate of the above-named three defendants, and is in possession of the mortgaged property, they having been adjudicated insolvent. With the remaining defendants we are not concerned in this appeal. The District Judge gave a personal decree for Rs. 97,480-11-0 against "defendants Nos. 1, 2 and 3," but declined to make the immoveable property in question liable for the satisfaction of the debt, as he held that the mortgage deed was executed under undue influence. Against this portion of the decision the plaintiff has appealed, making defendants Nos. 1, 2, and 3 alone respondents.

During the progress of the trial in the Court of the District Judge, the defendant, Shimbhu Dial, died, and a preliminary objection has been taken by the respondents' pleader that as the decree was against a deceased person, there is no decree against his minor sons whom the plaintiff now seeks to make liable. It has also been objected that the appeal is barred by limitation as against the minor sons of Shimbhu Dial, and must therefore be held to be barred as regards all the respondents. There is no force in these objections. The plaintiff duly applied after the death of Shimbhu Dial to have his minor sons' names brought on to the record, and this application was granted by the Court on December 16th, 1899, the defendant, Jai Dial, being appointed their guardian *ad litem*. It was clearly therefore a mere clerical error that the decree was passed against defendants "Nos. 1, 2, and 3," and No. 2 must be held to be the minor son of the deceased.

As regards the merits, the only question for our decision is whether the mortgage deed is valid as between the plaintiff and the members of the firm of Moti Ram Jamna Das. The official receiver appointed by the Insolvency Court was not made a respondent by the appellant, nor have the respondents asked that he should be so made, nor has he applied to be so made, hence we are not concerned with the question whether the mortgage gave any undue preference to the plaintiff over other creditors of the firm. After examining the record, and hearing counsel for both parties, we

are clearly of opinion that the mortgage deed represents a valid contract. The plaint was presented on November 16th, 1898, and some of the defendants filed their pleas on February 3rd, 1899. Defendants Nos. 1, 2 and 3, however, did not file theirs until February 16th, and then they filed only preliminary pleas such as that the stamp on the plaint was insufficient, and that there had been a misjoinder of parties and causes of action. The issues were fixed on March 9th, and it was not until April 25th that the respondents put in their plea that the mortgage deed had been executed owing to the exercise of undue influence.

On June 9th an issue was then added "was the mortgage deed in English executed by defendants Nos. 1, 2, and 3 under undue influence and fear of being disgraced having been brought to bear on them by plaintiff, and without the true contents of the deed having been explained to and consented to by them?" No explanation has been given to account for the great delay in filing pleas upon the merits, and it is to be observed that the written pleas, dated April 25th, 1899, though in considerable detail, in no way suggest that any *coercion* was employed to procure the execution of the deed.

The oral evidence recorded is that of Mr. Dickinson, the Agent of the Bank, of Kidar Nath, the Treasurer, of Ram Singh, Munshi of Mr. Clarence Kirkpatrick, for the plaintiff, and of Jai Dial, defendant, for the defence. This evidence deals with four stages in the case; first, a conversation between Jai Dial and Kidar Nath at the former's shop; secondly, an interview between Jai Dial and the Agent of the Bank in the presence of Kidar Nath, who acted as interpreter; thirdly, a meeting at Mr. Kirkpatrick's house at which the deed was drawn up by Mr. Kirkpatrick and signed by Jai Dial; and, lastly, the execution of the deed by Din Dial and Shimbhu Dial at their house. We observe that Jai Dial's evidence differs very materially from the written pleas filed on April 25th, 1899. In the written pleas it is stated that at Mr. Kirkpatrick's house Jai Dial was told that the deed provided that he would only be responsible if the business of the acceptors of the *Hundis* failed, and the money could not be realized from them. In his deposition Jai Dial stated that at the interview with the Agent, he was informed that the Bank would help him to the fullest extent if he executed the mortgage, and that at Mr. Kirkpatrick's house he was told that he would not be allowed to depart until he signed the document. This is the first mention of coercion. We have no doubt that the evidence of this witness was much exaggerated, as the whole tenor of it shows; he even went so far as to depose that he did not know even then (when he gave his evidence) what

the deed contained. That pressure was put upon him to execute the mortgage deed as security for the payment of the debt there can be no doubt; admittedly the choice was given him of furnishing the security or being at once put into Court, but we are not prepared to hold with the District Judge that such pressure amounted to "undue influence" within the meaning of Section 16 of the Indian Contract Act, as amended by Act VI of 1899. To reap the benefit of that section it was necessary for the defence to establish that the executors of the deed were induced to sign it because the plaintiff was in a position to dominate their will and used that position to obtain an unfair advantage over them. For the respondent's reliance has been placed on a decision of the Allahabad High Court in the case of *Sital Prasad v. Parbhu Lal* ⁽¹⁾, but the facts of that case bear no resemblance to those of the present. There, the plaintiff was wrongfully kept out of an estate by certain wealthy persons, and being without means was cared for by the defendant for a period of several months: supplied with funds by the defendant, the plaintiff was enabled to establish his claim to the estate, and during the progress of the litigation was induced to sell half of it to the defendant for a nominal consideration, and subsequently to gift the other half in favour of a temple in which the defendant was interested, the result being that the plaintiff left the defendant as poor as when he first went to him. It was held that it was for the defendant to establish to the satisfaction of the Court that the gift was an honest and *bonâ fide* transaction that ought to be upheld. The present case is wholly different. The respondents, bankers and men of business in a large commercial centre, had incurred a considerable debt from the plaintiff, and being unable to meet their liabilities by paying cash, executed a deed mortgaging immovable property as security. On the face of it such a transaction was in no way unconscionable, and might well be a beneficial arrangement for the respondents as much as for the plaintiff, and clear and convincing evidence is obviously required to justify a Court in relieving them from the consequences of their act. It has been said that the sudden news of their financial embarrassment must have caused the respondents such mental distress that the plaintiff was able to dominate their will, but of this there is no evidence, nor was such a plea raised in the District Court.

We are wholly unable then to hold that the plaintiff attempted to obtain or did obtain any unfair advantage over the respondents, and consequently the contract was not voidable at their option.

⁽¹⁾ *I. L. R.*, X All, 535.

We accept the appeal, and add to the decree of the first Court a declaration that the properties mortgaged in the plaintiff's favour by the deed, exhibit P. 18 are, as between the parties to this appeal, validly mortgaged to the plaintiff, and that the plaintiff is entitled to recover the amount mentioned in the deed from those properties.

The plaintiff will recover his costs in this Court and also in the lower Court from the respondents.

Appeal allowed.

No. 37.

Before Mr. Justice Chatterji and Mr. Justice Maude.

NANDA SINGH AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

SUNDER SINGH AND OTHERS—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 1285 of 1898.

Contract—Contract Act (IX of 1872), Section 23—Agreement by plaintiffs and defendants to purchase certain landed property at an auction jointly and not to bid against each other—Void contract—Public policy—Jurisdiction—Suit for possession of land—Value of subject-matter—Court Fees Act, 1870, Section 7, clause 10.

Plaintiffs sued for possession of $\frac{3}{11}$ ths share of certain plots of land sold at an auction by Government on the allegation that the plaintiffs and defendants before the auction had entered into an agreement to buy the land in partnership and thereafter to divide it, and that they had paid their quotas of the portion of the purchase money deposited on the day of the sale and were willing to pay the balance, and had been wrongfully refused their share by the defendants. The first Court having decreed the claim, the Divisional Judge reversed it on the ground, amongst others, that the alleged agreement was void as opposed to public policy, inasmuch as the parties had agreed to purchase the property at the auction jointly and not to bid against each other. He also found that the form of suit was really one for specific performance of a contract in writing and that the first Court had no jurisdiction to try it.

Held, that under the circumstances of the case the agreement was perfectly lawful and one that should be enforced being more in furtherance of public policy than against it.

Held, also, that clause 10 of Section 7 of the Court Fees Act was not applicable as there was no agreement to perform. The defendants had already performed the contract they had made to buy the property and the title vested in the plaintiffs as soon as the purchase was effected and they had become joint-owners with the defendants, and thirty times the *jama* of the $\frac{3}{11}$ ths share of the property which was sued for being Rs. 932, the first Court had jurisdiction to try the suit.

Pallah Mal v. Bhupa Mal ⁽¹⁾, *Hari Balkrishna Joglekar v. Naro Mereshwar Joglekar* ⁽²⁾, *Doorga Singh v. Sheo Pershad Singh* ⁽³⁾, and *Gobind Chandra Gangapadhya v. Sherajunnissa Bibi* ⁽⁴⁾ followed. *Chemibai v. Secretary of State* ⁽⁵⁾ referred to.

Further appeal from the decree of Khan Bahadar Sayad Muhammad Latif, Divisional Judge, Lahore Division, dated 4th July 1898.

Parker, for appellants.

K. P. Roy and Gobind Ram, for respondents.

The judgment of the Court was delivered by

28th Jany. 1901.

CHATTERJI, J.—The facts of this case are briefly these. On 20th March 1896, a *rakh* known as Rawal Jhangar, the property of Government, was sold by auction in two plots in the Court of the Deputy Commissioner at Lahore. Plot No. 1, comprising 111 acres, was knocked down to Jhanda Singh, defendant, for Rs. 6,250, but at his instance the names of Hira Singh, Arjan Singh, Khushal Singh and Ishar Singh, defendants, residents of *mauza* Handal, were also entered as purchasers in the *fard nilam*. Plot No. 2, 123 acres in area, was knocked down in the name of Sunder Singh, defendant, of Rawal Jhangar, for Rs. 5,500.

The plaintiffs, two of whom Nanda Singh and Saudagar Singh belong to Handal, and the third, Mian Singh, to Rawal Jhangar, sue for a $\frac{1}{4}$ th share of the two plots, on the allegation that before the auction but on the same date that it took place the parties entered into an agreement to buy and to pay for the land in partnership and thereafter to divide it amongst themselves. They further allege that they paid their *quotas* of the portion of the purchase money deposited on the day of sale and are willing to pay the balance, but are wrongfully refused their shares by the defendants.

The Handal defendants admit the execution of the agreement by all the parties but plead that plaintiffs afterwards refused to join in the purchase or to pay any money, and that the agreement was cancelled and the document taken back by them. Sunder Singh, defendant, denies having entered into any agreement or received any money from the plaintiffs and asserts that he made the purchase on his own account and paid for it from his own pocket.

The other defendants of Rawal Jhangar, who are Sunder Singh's brothers, pleaded to the same effect, but Ala Singh afterwards admitted the execution of the agreement by all the eleven persons, whose names appear in it.

⁽¹⁾ 110, P. R., 1888 (F. B.).

⁽²⁾ I. L. R., XVIII *Pcm.*, 342.

⁽³⁾ I. L. R., XVI *Calc.*, 194.

⁽⁴⁾ 13, C. L. R., 1.

⁽⁵⁾ *Bcm. P. J.*, 204.

The first Court drew seven issues which covered all the points raised by the pleadings before it and found them all in plaintiffs' favour and decreed the suit.

On appeal the Divisional Judge held that the execution of the agreement by Sunder Singh was not proved nor the payment of their *quotas* of the purchase money by the plaintiffs, that the agreement was without consideration and opposed to public policy in that the executants agreed not to bid against each other at the auction and thus to keep down the price of the land sold and afterwards to divide the spoils, and that the suit was really for specific performance of the agreement and was thus beyond the jurisdiction of the first Court which was that of a Munsif with first class powers.

The points arising for determination in this appeal upon the original pleadings and the arguments advanced in the Divisional Court and this Court appear to be the following :—

1. Whether the Court of first instance had jurisdiction to hear the suit ?
2. Whether the agreement of 20th March 1896 is void, as opposed to public policy, inasmuch as the parties stipulated to purchase the land at the auction jointly and not to bid against each other ?
3. Did Sunder Singh, defendant, execute the agreement ?
4. Did plaintiffs rescind the agreement after the auction sales ?
5. Did plaintiffs pay their portions of the deposit required on account of the purchase money and are they precluded from claiming a share of the land if they did not do so ?
6. To what relief are plaintiffs entitled and are they entitled to the share sued for ?

As regards jurisdiction, it appears that the $\frac{1}{11}$ th share, the possession of which is sued for, is valued at thirty times the *jama* at Rs. 932-10-6 on the principle laid down in the Full Bench decision in *Ballah Mal v. Bhupa Mal* (1), the first Court clearly had power to try the suit.

Sunder Singh denied that the land he purchased was assessed to revenue, but no such objection was urged by the other defendants, and from the *fard* filed the plea appears to be false. We see no reason to differ from the concurrent finding of the lower Courts that the land is revenue paying land. The other objection

(1) 110, P. R., 1888.

with reference to jurisdiction which the Divisional Judge found established is that the suit is for specific performance of the agreement within the meaning of Section 7, clause 10 of the Court Fees Act, and that the market-value of the property furnishes the test of jurisdiction. The suit, however, is not specifically covered by the clause in question. See *Chunibai v. Secretary of State in Council* (1).

In any case there was no agreement to perform. The defendants had already performed the contract they had made to buy the property. By virtue of the agreement the title to it vested in the plaintiffs as soon as the purchase was effected and plaintiffs became joint-owners with the defendants. They could only claim possession of their shares which they sued for and which as shown above the Court had jurisdiction to award them after adjudication.

On the second question we are unable to agree with the view of the Divisional Judge. We may here mention that the point was not taken in the first Court nor in the grounds of appeal to the Divisional Court. The authorities quoted by the Divisional Judge appear to us to be inapplicable to the facts of this case, and not to support his conclusion. The reference to Story's *Equity Jurisprudence* is to an old edition, but Section 293 of the second English edition distinctly says that agreement whereby parties engage not to bid against each other at a public auction are now held to be valid. Similarly the other American authority cited by the Divisional Judge, Fisk Beach's *Modern Law of Contracts*, contains exceptions to the doctrine enunciated by him, *vide* Section 1538 and 1540. In page 121, *Dart on Vendors and Purchasers*, 6th Edition, the law is thus stated : " An agreement between two persons " not to bid against each other at an auction is legal ; and forms a " valuable consideration for an agreement giving to the party " withdrawing his opposition at the auction, a right of pre-emption " over other property ; and such an agreement was held valid, " when the sale was made by order of the Court. "

In *Hari Bulkishna Joglekar v. Naro Moreshtar Joglekar* (2), it was held that there is nothing necessarily unlawful in two or more persons agreeing not to bid against each other at an auction sale. This judgment approves of *Doorga Singh v. Sheo Pershad Singh* (3), in which after an examination of the authorities, it was held that deterring others from bidding for the property sold does not amount to fraud, and that an agreement between two bidders

(1) *Bom. P. J.*, 204.

(2) *I. L. R.*, XVIII *Bom.*, 342.

(3) *I. L. R.*, XVI *Cal.*, 194.

not to bid against each other is not sufficient ground for annulling the sale nor a combination among certain purchasers to the same effect. See also *Gobind Chandra Gangapadhy v. Sherajunnissa Bibi* ⁽¹⁾. The weight of the latest Indian authorities is thus against the view taken by the Divisional Judge.

The fact is the Divisional Judge has acted on a very broad statement of the rule applicable to agreements of this kind without reference to the facts before him.

There may be instances where a contract between two persons to keep down the price of something sold by public auction may be immoral and opposed to public policy, but this will depend upon the nature of the agreement and the consideration passed.

But a pure business agreement to join in purchasing anything at an auction cannot be held to come within any such rule. There is no law forbidding joint purchase at auctions or partnership in things sold to the highest bidder. If several persons agree to buy jointly it necessarily follows that they cannot bid against each other and this is understood whether they expressly stipulate to that effect or not. In the present case the land was sold in large blocks, and it was believed that the price they would fetch would be beyond the means of most of the landowners in the neighbourhood to pay. So they adopted the most sensible course possible under the circumstances and clubbed together in order to buy the land by their united means and then to divide it amongst themselves. This was a *bona fide* business arrangement for the benefit of the parties concerned and was not intended to harm the seller of the land even if it indirectly had that effect. To say that the agreement was opposed to public policy because they agreed not to bid against each other is to lay down that a person who is unable to buy an entire property sold at an auction out of his individual means must not attempt to buy a portion of it until at least the sale has been completed which is absurd. In reality the agreement among the parties had the effect of enlarging the circle of buyers who were willing to pay higher prices than mere capitalists. To disallow it would have the effect of restricting the competition to men of large means who would buy only for the sake of securing good investments for their money. The purchase of land by men who intend cultivating it themselves is desirable, and this is another consideration for holding the contract was more in furtherance of public policy than otherwise.

We have no hesitation in holding that the agreement is perfectly lawful and one that should be enforced.

⁽¹⁾ 13, C. L. R., 1.

On the third point we have no difficulty, after hearing the evidence and weighing the probabilities in finding that the execution of the agreement by Sunder Singh is proved. The stamp was purchased in his name and the statements of Ala Singh, his own brother, Arjan Singh, zaildar, and Hira Singh, defendants, and other witnesses clearly show that he was present and put his mark on the agreement. Ala Singh tried to retract his evidence regarding Sunder Singh's presence in his cross-examination, but this is of no consequence as he was bound to try to help his brother. The statements of the other defendants also are against their interests as they contested the claim. They alleged that plaintiffs withdrew from the agreement and took it back but failed to prove this. In support of the agreement are the facts that all the other Handal defendants are associated with Jhanda Singh in the purchase of plot No. 1, and that plaintiffs four days after the sale, *viz.*, on 24th March 1896, and again on 20th April applied to be entered as purchasers with Sunder Singh. They also when relief was refused by the Revenue authorities applied for registration of the agreement and ultimately succeeded before the Registrar.

All this action on their part clearly supports their contention with reference to the agreement. The learned counsel for Sunder Singh was obliged to admit that there probably was some talk about the joint purchase which according to him explained the writing of the agreement, and to content himself with attempting to show that Sunder Singh was not proved to have executed it or to have made his purchase jointly with the others. Sunder Singh's evidence entirely fails to rebut the plaintiffs' case and is palpably false.

The fourth point has already been touched on in discussing the third. The Handal defendants who set up plaintiffs' abandonment of the agreement have produced no evidence to prove their contention. Nor is the possession of the written agreement by the plaintiffs against them as the Divisional Judge seems to think, and as has been argued before us. One of the parties had to keep custody of the document, and there is no reason why plaintiffs should not have done so.

It could not have been returned to them because the agreement was cancelled, as in that case it would have been torn up. Plaintiffs' subsequent conduct amply bears out the truth of their story.

As regards the fifth question, we are not able after a careful consideration of the evidence to hold that the plaintiffs paid up their *quota* of the deposit for the purchase money. There is little room

for doubt that they were ready to pay, but it is doubtful whether they actually did so. Their allegations in this respect are somewhat peculiar. They said before Rai Arjan Das that they paid Sunder Singh at the time of the writing of the agreement, but this is doubtful, inasmuch as (1) at that time the auctions had not taken place and the amounts payable were not known, and (2) there is no reason why they should then have paid to Sunder Singh alone. There possibly was a talk about their sharing with Sunder Singh and the others with Jhanda Singh as plaintiffs themselves admit, but this was at a later stage and not in the beginning. Had they paid Sunder Singh before the auction they would probably have taken some acknowledgment from him, whereas there is no such probability if they paid after the property was knocked down to Sunder Singh and he had only to mention their names as co-sharers with him. We also doubt whether after taking plaintiffs' money in the presence of witnesses Sunder Singh would have drawn back from the written agreement. Their witnesses depose to payment after the auction. Thus there is a discrepancy which is somewhat important and plaintiffs have not attempted to reconcile it. The evidence also is not of a convincing character and their counsel admits this to be the case.

We think it probable that Sunder Singh, having got the land at a smaller price than he expected, put off plaintiffs on some pretence or other and got his sole name recorded as the purchaser and then repudiated the agreement altogether. There are some considerations in plaintiffs' favour, viz., that they asserted payment from the very first, but this they were bound to do in order to strengthen their claim. As they are plaintiffs the inconclusive nature of their evidence must go against them.

But the fact of non-payment does not, as defendants' counsel contends, militate in the least against their claim. In the first place the alleged refusal by them to pay is not proved and the probability is that they were always ready to pay and were prevented from paying by the defendants and particularly by Sunder Singh. On this hypothesis their right is absolutely unaffected even if the defendants' argument has any force. But assuming that they did commit a default it does not follow, as defendants' counsel argue, that their rights were forfeited or did not accrue. The argument is based upon a confusion of ideas as to the nature of their right. There were two perfectly distinct transactions between different parties. First, there was the agreement among the present parties by which they became partners in all property that was bought by any of them at the auctions that were then about to be held.

As soon as it was executed the parties became partners and when the purchases took place they became jointly entitled to the

latter in accordance with the terms of the agreement. Secondly, the transactions of purchase were between the parties on one side acting through their agents the ostensible bidders and the Government on the other. The title of the purchasers as a body accrued in accordance with the conditions of the auction sales, but as soon as the title was transferred from the seller it vested in all the parties to the agreements, plaintiffs among them.

The condition that the *quotas* of each sharer would forthwith be paid did not divest that title from any co-sharer who failed to pay as stipulated. The failure merely raises a question of account between the persons who paid and those who did not. The former would ordinarily be entitled to retain possession until payment, but in the absence of a special provision to that effect the title of the defaulting co-sharer cannot be divested.

This appears to be a self-evident proposition to us and no authority to the contrary was quoted for the defendants.

As regards the last point we are of opinion that it is not established though it might have been once proposed, that plaintiffs were to take their shares with Sunder Singh and his brothers, while the other defendants shared in Jhanda Singh's purchase. There is no special provision in the agreement defining the shares of the parties and the consequence of this is, that all shares are to be presumed equal in the entire property purchased which consisted of two plots. The plaintiffs therefore have rightly claimed a $\frac{3}{11}$ th share of the whole, and this should be awarded to them.

We accept the appeal and restore the decree of the first Court, with this modification, that plaintiffs are to pay Rs. 3,223-11-6 instead of Rs. 2,806-11-6. The defendants-respondents will pay costs throughout.

Appeal allowed.

No. 38.

Before Mr. Justice Chatterji and Mr. Justice Maude.

JIWAN RAM,—(PLAINTIFF),—APPELLANT,

Versus

AMIR BEG,—(DEFENDANT),—RESPONDENT.

Civil Appeal No. 49 of 1900.

Mortgage—Conditional sale—Foreclosure—Regulation XVII of 1806—Validity of notice of foreclosure of mortgage.

Held, that in a case where the foreclosure proceedings are otherwise correct and regular, mere clerical slips or misprints in a notice under Section 8 of Regulation XVII of 1806, such a "Act" and "Resolution" or "Zarlu-

APPELLATE SIDE. {

tion" for "Regulation" when the rest of it was properly worded in all particulars cannot be held to render it void.

Further appeal from the decree of H. A. Rose, Esquire, Divisional Judge, Ferozepore Division, dated 17th October 1899.

Lal Chand and Sangam Lal, for appellant.

Golaknath, for respondent.

The case was referred to a Divisional Bench by the following order of the learned Judge in Chambers :

CHATTERJI, J.—The facts appear sufficiently from the judgments of the lower Courts. Both the Courts found the notice to be correct in form, and the foreclosure proceedings to have been regular. The Divisional Judge, however, found the interest charge heavy, and reduced it and allowed the defendant six months' time to redeem. 18th Augt. 1900.

Respondent's counsel declares himself unable to support the Divisional Judge's decree, and in my opinion there can be little doubt that it is not sustainable. He, however, objects to the foreclosure proceedings, and urges that in the notice the Regulation is called an Act in one place and "Resolution" or "Zarlution" at another, and says this is fatal. The question, whether the defects were likely to mislead, is not essential, as the rule laid down by the Privy Council and the High Courts in their decisions on the Regulation is that the provisions are to be very strictly construed.

But the errors here are simply misprints in the form issued by this Court: and, as at present advised, I do not think they have any bearing on the question, whether the notice was a proper one or not, under the Regulation. If that were so, trivial errors in spelling might be fatal. The Regulation is called an Act in one place, but the year and section are rightly given, and it is described as a resolution or *zarlution* elsewhere, which is bad spelling. No authority is quoted in support of the contention. In *Wali Muhammad v. Ramji Lal* (1), Mr. Justice Rattigan took the view that such errors do not vitiate the proceedings, but in that case the error was in the heading. Here it is in the body of the notice.

Both the Courts hold the service of notice proved.

It is further argued for the appellant, on the authority of *Ruldu Khan and others v. Mussammot Kandi and others* (2) that the objection cannot be urged by the respondent in answer to the appeal.

(1) 6, P. R., 1901.

(2) 25, P. R. 1897.

I think it right to refer the case to a Bench for decision, as it is usual to construe the provisions of the Regulation very strictly, owing to their harshness.

Order accordingly.

The judgment of the Divisional Bench was delivered by

30th Jany. 1901.

CHATTERJI, J.—The questions requiring decision in this appeal are set forth in the order in Chambers, dated 18th August 1900, which will be read as part of this judgment.

Respondent's counsel puts forward the same contentions as before. The objection to his supporting the lower Appellate Court's decree on those grounds is not pressed by appellant's counsel, and we have therefore only to decide whether they are well founded.

After giving our best consideration to the arguments on both sides and the authorities cited we are of opinion that the view of the Divisional Judge as to the regularity and validity of the foreclosure proceedings is substantially correct. We do not think the misprints in the notice mentioned in the previous order can be held to vitiate those proceedings. This view is supported by *Woli Muhammad v. Ramji Lal* ⁽¹⁾ and *Mussammal Sardari v. Chiranjil Lal and another* ⁽²⁾. The line of reasoning adopted in *Wasawa Singh v. Rura* ⁽³⁾ as to objection (d), pages 97, 98, appears to cover the error in the notice. It is true that we have to construe the foreclosure proceedings very strictly, but mere clerical slips or misprints, which can possibly mislead no one, cannot be reasonably held to render them void. Here the use of the word Act in the vernacular and "Resolution" or "Zarlution" for Regulation cannot be held by any stretch of imagination to be calculated to mislead the mortgagor, the application for issue of notice as well as the rest of the notice itself being properly worded in all particulars. We are, therefore, obliged to come to the conclusion that the objections taken to the foreclosure proceedings are not tenable.

The appeal is accordingly accepted and the decree of the first Court restored.

Appeal allowed.

⁽¹⁾ 5, P. R., 1901.

⁽²⁾ 28, P. R., 1901.

⁽³⁾ 24, P. R., 1895.

No. 39.

Before Mr. Justice Harris.

TEKA—(DEFENDANT),—APPELLANT,

Versus

SOHNU AND OTHERS, — (PLAINTIFFS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 1254 of 1900.

Limitation—Change in the law of limitation—Effect of new law on claims barred under the old law—Limitation Act (XV of 1877), Schedule II, Article 120—Punjab Limitation Act (I of 1900).

In a suit filed in 1900 by a reversioner of a sonless proprietor to have an alienation of ancestral land made in 1889 by such sonless proprietor declared void, the first Court found the claim barred under Article 120, Schedule II of Act XV of 1877. The Divisional Judge on appeal held that the right to sue, though barred under Act XV of 1877 at the date of the institution of the suit, was revived by the operation of the Punjab Limitation Act (I of 1900) which was in force at that date.

Held, that the right to sue barred under Act XV of 1877 before the Punjab Limitation Act (I of 1900) came into force was not revived by that Act.

Miscellaneous further appeal from the order of S. Clifford, Esquire, Divisional Judge, Hoshiarpur Division, dated 24th October 1900.

Sukhdyal, for appellant.

Sohan Lal, for respondents.

The judgment of the learned Judge was as follows :

HARRIS, J.—Plaintiffs sued on the 7th July 1900 as reversioners of Dadu, a sonless proprietor, to have an alienation made in 1889 by Dadu of ancestral land declared void as against their reversionary interest. 22nd Feby. 1901.

The first Court dismissed the claim as time-barred under Article 120, Schedule II, Act XV of 1877.

The Divisional Judge, on appeal, held that the right to sue, which was barred under Act XV of 1877 when the suit was instituted, was revived by the operation of the Punjab Limitation Act (I of 1900), which was in force at date of institution of suit, and remanded the cause under Section 562, Civil Procedure Code, for trial on the merits.

This appeal is from the order of the Divisional Judge remanding the cause. The merits of the preliminary point have to be decided.

The reasons given by the Divisional Judge for his conclusion are (1) that Section 2, Act XV of 1877, as to non-revival of right

to sue is "not made applicable" by the Punjab Act, and (2) that the Punjab Act did not contemplate validating all alienations like the one in question "at one sweep."

With regard to the first reason it is, I consider, plain that Section 2 of Act XV of 1877, could not be "made applicable" to the Punjab Act as that section only provides for specific enactments. There is no force in the argument that only Sections 5 to 25 of Act XV of 1877 are by Section 2 of the Punjab Act to apply, for Section 2 of the Punjab Act is so far merely a re-draft of part of Section 4 of Act XV of 1877 as will be seen by a perusal of the two sections.

But what the Divisional Judge wished, no doubt, to express was that in the absence of express provision the right to sue is revived, as is evident from the tenor of his second reason based upon the imagined intention of the local Legislative Council.

The effect of the Punjab Act is generally to lessen the period for a possessory suit while extending that allowed for a declaratory suit, and to my mind an intention to revive a right to sue which under the previous law of limitation is barred is not deducible therefrom.

No authorities have been cited by the Divisional Judge in support of his view, and indeed on the particular point whether in the absence of express provision the right to sue is revived, the authorities appear opposed to that view. Thus the Limitation Act, IX of 1871, contained no provision as to the effect of the previous Limitation Act of 1859, but it has been held that a right to sue barred under the earlier Act was not revived by the Act of 1871 (See *Appasami Odayar v. Subramanya Odayar* ⁽¹⁾ at page 33; *Nocoor Chunder Bose v. Kully Coomar Ghose* ⁽²⁾; *Krishna Mohun Bose v. Okhilmoni Dossee* ⁽³⁾; *Finayak Govind and Narayan v. Bahaji* ⁽⁴⁾; *Hakim Deri Dyal v. Prab Dyal* ⁽⁵⁾ followed in *Hakikat Rai v. Ganga Das* ⁽⁶⁾).

In support of the order of the Divisional Judge it is here urged (1) that the provisions of Section 6, Act XV of 1877, as to future local law exclude the application of the shorter period prescribed by that Act, (2) that a new limitation law like a new law of procedure has retrospective effect, (3) that the rulings as to the effect of repealing Acts of Limitation are not here applicable as there has been no repeal, (4) that even if a declaratory suit is barred under Act XV of 1877, it is only one remedy which is

⁽¹⁾ *I. L. R.*, XII *Mad.*, 26.

⁽²⁾ *I. L. R.*, I *Calc.*, 328.

⁽³⁾ *I. L. R.*, III *Calc.*, 331.

⁽⁴⁾ *I. L. R.*, IV *Bom.*, 230.

⁽⁵⁾ 85, *P. R.*, 1880.

⁽⁶⁾ 167, *P. R.* 1888.

barred, the reversionary right with right to sue for possession still subsisting.

As to the first contention I do not understand Section 6 of Act XV of 1877, so far as it relates to a future special or local law, and affects the present case, to do more than provide against a conflict between two prescribed and existing periods. It would not seem to apply to a period which under the provisions of the general law has ceased to exist, for where that has happened there is no longer any danger of conflict. The further question whether Section 6 covers provisions of the general law of limitation other than those prescribing periods does not appear to touch the point here under discussion.

On the second contention are cited *Hajrat Akramnissa Begam v. Valiunnissa Begam* ⁽¹⁾ and *Balkrishna Pandharinath v. Bapu Yesaji* ⁽²⁾. No doubt the operation of a statute of limitation is generally retrospective. But the retrospective effect of limitation law does not extend to rights already acquired or extinguished when that law comes into force—*Khusalbai v. Kabbai* ⁽³⁾.

The third contention seems to me futile. The terms of the preamble to the Punjab Act and the absence of any direct repealing schedule are explained, so far as declaratory suits of a particular kind are concerned, by the fact that Article 120 of Act XV of 1877 is of a general nature, and the words "and notwithstanding any thing to the contrary in the second schedule of the same Act contained" which occur in Section 2 of the Punjab Act preclude the application of Article 120 to those suits, and so far repeal it. Moreover, this contention will not serve respondent. If there has been no repeal the suit is clearly time-barred.

As to the fourth contention. It is true that only one remedy would be barred under Act XV of 1877, and that the reversionary right is not wholly extinguished, the possessory suit in the event of the alienor's death remaining. But that barred remedy is the right to sue for a declaratory decree which is the right claimed in the present case, and that right to sue was extinguished before the Punjab Act came into force.

The principle that in cases where only the remedy is barred and the right is not extinguished the period is revived under the new law has been evolved in cases of debt, but has not been applied to rights in immovable property. Here I fail to see how a possible right to sue for possession revives the right to sue for a declaration.

(1) I. L. R., XVIII Bom., 420. (2) I. L. R., XIX Bom., 204.

(3) I. L. R., VI Bom., 26.

That a new limitation law will not revive a barred right has been laid down by the Privy Council (*Appasami Odayar v. Subramanya Odayar* ⁽¹⁾), cited with approval in *Mohesh Narain Munshi v. Taruck Nath Moitra* ⁽²⁾ at p. 38) and by the High Courts in this country several of whose rulings have been already cited on this point.

For the above reasons I hold the Punjab Act did not revive the barred right to sue for a declaration, and that the first Court rightly dismissed the claim as time-barred. I set aside the order of the Divisional Judge and restore the order of the first Court dismissing the claim.

Plaintiffs will bear all costs throughout.

Appeal allowed.

⁽¹⁾ *L. B. 15. I. A. 167; I. L. R., 12. Mad., 26.*

⁽²⁾ *L. R. 20. I. A. 30; I. L. R., 20. Cal., 487.*

No. 40.

Before Mr. Justice Robertson and Mr. Justice Maude.

MUHAMMAD HASSAN KHAN AND ANOTHER,—
(DEFENDANTS),—APPELLANTS,

Versus

MUHAMMAD GUL KHAN,—(PLAINTIFF),— } RESPON-
MEHR KHAN AND ANOTHER,—(DEFENDANTS),— } DENTS.

} APPELLATE SIDE.

Civil Appeal No. 527 of 1898.

Mortgage—Mortgage of niawadari rights—Redemption of—Physical possession.

Held, that according to the custom of the Gandapur tract of the Dera Ismail Khan District a *niawadari* mortgagee may acquire rights in the land held by him as mortgagee, independently of and over and above his rights as mortgagee; and that such rights would not necessarily be extinguished by the redemption of the *niawadari* mortgage.

Moosa Khan v. Muhammad Naurang Khan (1) followed.

Further appeal from the decree of R. L. Harris, Esquire, Divisional Judge, Derajat Division, dated the 25th January 1898.

Harkishan Lal and Ram Bhaj Datta, for appellants.

Madan Gopal and Muhammad Shah Din, for respondents.

The judgment of the Court was delivered by

ROBERTSON, J.—The facts are set forth in the judgments of 30th Nov. 1900. the lower Courts and need not be recapitulated at length here. The difficulties experienced in disposing of the case arise out of the complicated nature of the tenures of land in the Gandapur tract to which this case relates.

It appears that Kalu Khan, father of defendants 1 and 2, with many others, first mortgaged certain lands or certain rights in land to Sardar Khan and Shah Nawaz Khan for a certain sum which was less than Rs. 600.

Later on Sardar Khan and Shah Nawaz Khan executed a mortgage which is the subject of this dispute for the same land to Kalu Khan of the rights of *niawa* for Rs. 600, and later on again they mortgaged to the plaintiff.

At first it was not clear why Kalu Khan, who as one of the original mortgagors was competent to redeem the whole original mortgage for a smaller sum, should have accepted a sub-mortgage for a larger one, but the matter is explained by the fact that a *niawadar* who comes in originally as a kind of *quasi* mortgagee, is really something different and during the time of his tenure

(1) 24, P. R., 1871.

may acquire rights which cannot be redeemed merely by payment of the sum originally lent. It is upon the making clear of this proposition that the case turns, and it appears to have been due to a want of appreciation of this that both the learned Divisional Judges fell into error.

We will clear the ground first by considering the meaning of the mortgage deed executed by Sardar Khan and Shah Nawaz Khan in favour of Kalu Khan on 2nd July 1873, and under which the present plaintiffs now seek to redeem, claiming by right of such redemption rights of *niawadari*, tenancy-at will, and cultivating occupancy.

We are clearly of opinion that, considered by itself, the deed is in no sense ambiguous and clearly mortgages only the right as *niawadar* to take one-eighth produce from the tenants-at-will. Whatever possession the mortgagor might actually possess was clearly reserved, and there is no condition in the mortgage giving the mortgagees any right to possession. The words themselves are quite clear, "the mortgagors will remain in possession, the mortgage will be redeemed when the mortgage money is paid, until "which time the mortgagee will continue to enjoy one-fifth share "of the produce as *moyajora* from all five pieces of land forming "the subject of this mortgage, and will continue to enjoy that "share as we the mortgagees enjoy it now."

"*Moyajora*" was a right to certain shares in the produce of land taken sometimes by the *lathband* or occupancy tenant from cultivators associated with him, sometimes by a proprietor or by a *niawadar* mortgagee, the share being given theoretically in return for the labour and expenditure originally incurred in bringing the land under cultivation by means of oxen since dead. *Moyajora* meaning "the dead pair." This is described at para. 203, pages 106-107 of Mr. Tucker's Settlement Report of Dera Ismail Khan. The deed itself simply purports to mortgage the right to take *moyajora*, and so far we are entirely in accord with the view taken by the first Court.

It is, however, urged upon us that the universal custom of the tract makes it necessary to read something into the deed in order to construe it in accordance with the intention of the parties. The custom of *niawadari* mortgage is described at paras. 282 and 283 of the Settlement Report, which does not altogether support the view put forward.

The judgment of this Court, however, in *Moosa Khan v. Muhammad Naurang Khan* ⁽¹⁾, makes it quite clear that a

niawadari mortgagee may himself acquire rights in the lands held *niawadari* by him which are not extinguished by the redemption of the mortgage under which he holds.

It was this fact which prevented Kalu Khan from redeeming the original mortgage to Sardar Khan and Shah Nawaz Khan, for those persons were of course not prepared to part with any rights which they might have acquired independently of the mortgage during its term, and this we take it makes it clear why the reservation regarding possession was so clearly expressed in the deed. Similarly now Kalu Khan's representatives while ready to allow redemption of the mortgage as made to them are not prepared on redemption to part with any rights acquired by them independently of the mortgage but during its term, in accordance with the custom as explained in *Moosa Khan v. Muhammad Naurang Khan* ⁽¹⁾ and stated by the Settlement Officer to be the best solution of a complicated question. The point really in dispute now becomes clear. The plaint recites that Sardar Khan and Shah Nawaz Khan were possessed of the "*Haqqiyat niawadari, ghair maurusiat mai kabza kasht in mauza Rori,*" that is were possessed of the *niawadari* rights and the rights of tenants-at-will and of cultivating possession in *manza Rori*, and goes on to assert that they mortgaged all these rights to Kalu Khan. This is misleading, the *niawadari* rights were mortgaged no doubt, but mere transfer of *niawadari* rights does not necessarily mean an immediate right to physical possession, and such right was expressly in terms reserved in the deed. Moreover, under the custom of the country even if it did include such rights in 1873, the *niawadars* were clearly competent to acquire rights of cultivation in the land held *niawadari* during the term of their mortgage, whether there are merely the rights of tenants-at-will who may be subject to ejection in accordance with the law, for even tenants-at-will have certain rights, or they amount to occupancy rights. After a careful consideration of the deed, of the description of the tenure given by the Settlement Officer, the circumstances of this particular case, and the judgment of this Court in *Moosa Khan v. Muhammad Naurang Khan* ⁽¹⁾, which the lower Courts do not appear to have discussed, the contention of the defendant appears to us to be correct; that plaintiffs are entitled to redeem the *niawadari* mortgage, but that such redemption gives them no right to immediate physical possession of any land held in cultivating possession by tenants whether those tenants are the *niawadars* whose mortgage is redeemed, or others. But to put the matter in a somewhat paradoxical manner, it is clear that *niawadars* may

⁽¹⁾ 24, P. R., 1871.

become their own tenants, and that when a *niawadar* mortgage is redeemed, they remain as tenants of the new *niawadar* who may deal with them as tenants in accordance with law and custom, and must respect any rights they may possess as tenants.

What those rights, if any, may be, in this instance cannot be decided in the present suit. We, therefore, accept the appeal, and decree instead that the plaintiff is entitled to redeem the *niawadari* mortgage on payment of Rs. 600, the words regarding cultivating possession being struck out. Costs in this Court and in the Courts below will be paid by the respondent.

Appeal allowed.

No. 41.

Before Mr. Justice Robertson and Mr. Justice Maude.

MUSSAMMAT FATIMA AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

ARJMAND ALI AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

APPELLATE SIDE. }

Civil Appeal No. 59 of 1897.

Custom—Succession—Succession of daughter—Sheikhs of Badli, Rohtak District—Non-agriculturists—Onus probandi—Punjab Laws Act, 1872, Section 5.

In a suit the parties to which were Sheikhs of the village of Badli in the Rohtak District, *found* in the absence of a custom to the contrary that the daughters succeed in preference to collaterals such as the defendants.

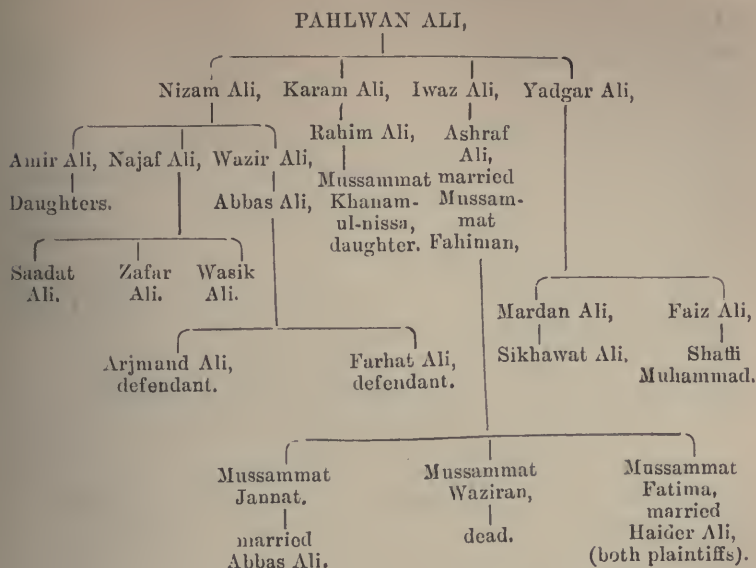
Where *prima facie* it is apparent that the parties to a suit were not ordinary agriculturists or carrying on the pursuit of agriculture, but had been employed for generations in State service, there is no initial presumption in favour of the existence of a custom under Section 5 (a) of the Punjab Laws Act, 1872. In such cases it should be ascertained whether the rule of descent is governed by custom or by the personal law of the parties.

Further appeal from the decree of S. Clifford, Esquire, Divisional Judge, Delhi Division, dated 26th October 1896.

Lajpat Rai and Lal Chand, for appellants.

Brown, for respondents.

The following table shows the relationship of the parties, and the case was, in the first instance, remanded for further enquiry by the following judgment of the Chief Court (*Gordon Walker and Maude, JJ.*):—



MAUDE, J.—The parties in this case are Sheikhs of the village of Badli in the Jhajjar *tahsil* of the Rohtak District. The plaintiffs are Mussammât Fatima and her husband Haider Ali, and the claim is in regard to the land and house property left by Mussammât Fatima's father, Ashraf Ali, who died sonless. The defendants are descendants of Ashraf Ali's uncle, Nizam Ali, and are the sons of Abbas Ali, who was said to have been adopted by Ashraf Ali.

26th July 1899.

The plaint was not drawn up as clearly as it might have been, but the pleadings show that in reality the plaintiffs relied on an alternative right, either they claimed to succeed because Haider Ali was the resident son-in-law of Ashraf Ali's widow, or Mussammât Fatima claimed under Muhammadan Law to succeed, as her father's daughter. The Additional District Judge, however, does not appear to have understood the matter clearly, because in the second issue, he framed the question whether, "the plaintiffs according to Muhammadan Law and custom are entitled to succeed . . . in virtue of their being the daughter and resident son-in-law of the widow," and when in his judgment, he discussed the contention of the plaintiff's mukhtar that the parties were Mussalmans and that the daughter was entitled to succeed by Muhammadan Law, he appears to have entirely misapprehended the question. Then finding that Ashraf Ali had adopted Abbas Ali, the defendant's father, he dismissed the plaintiffs' suit. They appealed to the Divisional Judge, their fourth ground of appeal being that "the lower Court should have held that according to

“Muhammadan Law plaintiffs were the legal heirs of the deceased.” The Divisional Judge, however, ignored this ground and disposed of the appeal as if there could be no doubt that the parties were bound by custom. He then found that custom did not recognise the adoption of Abbas Ali, but holding that the *onus* was on the daughter to prove that by custom she was entitled to succeed to the exclusion of the collaterals, and that she had failed to prove such a custom, he dismissed the appeal.

We are of opinion that further enquiry must be made, so that it may be ascertained whether the rule of decision is to be Muhammadan Law or custom. Under Section 5, clause (a) of the Punjab Laws Act, no doubt, the primary rule of decision in such cases is custom, if a custom is applicable, and as has been remarked in *Mussammat Fakhar-un-nissa v. Malik Rahim Bakhsh* ⁽¹⁾ where a rule of custom is known to be generally and widely prevalent, or where it has been found to govern a particular tribe, it may be right to start with an initial presumption in favour of its existence; but the circumstances of the present case unquestionably do not warrant the making of such a presumption. Neither Ashraf Ali, nor his father, Iwaz Ali, apparently themselves carried on the pursuit of agriculture, as each of them held the appointment of “Bakshi fauj” under the Raja of Jhind. Abbas Ali also succeeded to that appointment on the death of Ashraf Ali. The plaint describes Haider Ali, as “Ahlmad faujdari of Nizam Ali Sujangarh, in the State of Bikanir.” Moreover the houses in suit are described as built of *pikka* masonry, one being valued at Rs. 1,550. Thus it is not even *prima facie* apparent that the parties to the suit are ordinary agriculturists, nor do the houses claimed seem to be the dwellings of ordinary agriculturists. For aught that at present we know to the contrary, the members of Ashraf Ali’s family may have been employed for generations in service, and may have laid out a portion of their earnings in the purchase of land, and it may be that in questions of succession they are governed by their personal law and not by custom. We think, therefore, that the Courts should have determined the question, and not have assumed that custom was the rule of decision, and we remand the case under Section 566, Civil Procedure Code, to the first Court for inquiry and finding upon the following issues:—

(1). Is the rule of decision in this case custom or Muhammadan Law?

(2). If the latter, to what portion of Ashraf Ali’s estate is Mussammat Fatima entitled to succeed?

The return should be made through the Divisional Judge who is requested also to record his opinion upon the first Court's finding.

A return having been made to the order of remand, the judgment of the Court was delivered by

ROBERTSON, J.—The return to our order of remand has now been received and both the lower Courts report in favour of the respondent that the parties are governed entirely by custom and that neither daughters nor daughters' sons are entitled to succeed to ancestral property in this instance. The main question is now whether, Mussammat Jannat (married to Abbas Ali, father of the defendants), and Mussammat Waziran, who are two sisters, daughters of Ashraf Ali, should succeed to Ashraf Ali's estate in preference to the defendants who are descendants of Ashraf Ali's uncle, Nizam Ali, and are sons of Abbas Ali who was said to have been adopted by Ashraf Ali. The Divisional Judge held that the adoption was invalid, but that the *onus* of proving her right to succeed lay on the daughter and that she had failed. The finding as to the adoption we accept, indeed it is not now contested. A further enquiry, however, was ordered on the following issues: (1) is the rule of decision in this case custom or Muhammadan Law? (2) if the latter, to what portion of Ashraf Ali's estate is Mussammat Fatima entitled to succeed? The return is that the case is to be decided by custom and Mussammat Fatima is not entitled to succeed at all.

21st Oct. 1900.

So far we are prepared to accept the finding that the Muhammadan Law in its entirety is not the only rule which governs the case. But it is quite another matter to hold that because the parties are not bound exclusively by that law that therefore the daughter is not entitled to succeed, and it appears to us that both the lower Courts have failed in some degree to appreciate the effect of the evidence and the instances quoted, that of the pedigree table of the family of the parties, who are not in general agriculturists, but hereditary and other servants in general of the Jhind State, is given at page 3 of the paper book. The lower Appellate Court was wrong in saying that none of the instances quoted referred to the family of the parties; on the contrary some do. Rahim Ali, Ashraf Ali's own first cousin, who appears in the pedigree table, was succeeded by his daughter, Mussammat Khanam-ul-nissa, although they were male collaterals as nearly, indeed more nearly, related to Rahim Ali than the defendants in this case are to Ashraf Ali. This is a very strong, indeed in the absence of explanation, almost a conclusive instance in itself. Mussammat Araban, daughter of Hamayat

Ali, is another case, and there are several others given in the report of the first Court. We have consulted the various rulings quoted to us on both sides. (For appellant *Gurditta v. Mussammat Preman* ⁽¹⁾, *Ramzan Shah v. Sohna Singh* ⁽²⁾, *Bunyad Ali v. Faiz Muhammad* ⁽³⁾, *Mussammat Sardar Bibi v. Sayad Ali Shah* ⁽⁴⁾, *Nasirud-din Shah v. Mussammat Lal Bibi* ⁽⁵⁾, and *Mussammat Loriadi v. Mussammat Kishen Kaur* ⁽⁶⁾.) Those quoted for respondent do not appear to help his case (*Faiz-ud-din v. Mussammat Wajib-un-nissa* ⁽⁷⁾, *Mussammat Bano Begam v. Sayad Ahmad Ali* ⁽⁸⁾, and *Wajid Ali v. Latifat Ali* ⁽⁹⁾), and after considering the evidence and the rulings we consider that the appeal must be accepted. One of the rulings *Bunyad Ali and Mussammat Mojidan v. Faiz Muhammad* ⁽³⁾ relates to Sayads of Kharkhonda, a village in the same district as Badli, and in that it was held that a sister's son succeeded, in preference to first consins on the father's side. We think that there is material on the file which makes it clear that in the family to which the parties belong, daughters succeed in preference to collaterals such as the defendants. This is the Muhammadan Law, and as pointed out by Mr. Justice Plowden in *Mussammat Sardar Bibi v. Sayad Ali Shah* ⁽⁴⁾, as no other custom has been proved that would have to be followed, although the parties are not exclusively bound by that law under the provision of the Punjab Laws Act. The case of the plaintiff here is stronger still as the custom is proved affirmatively in his favour. We accordingly accept appeal and decree the plaintiffs' claim to one-half the property in suit as the sister of plaintiff was entitled to the other half. As each party has succeeded in regard to half the claim, the parties will bear their own costs in this and the lower Appellate Court. In the first Court defendant will pay half the plaintiffs' costs.

Appeal allowed.

⁽¹⁾ 48, P. R., 1889.

⁽²⁾ 60, P. R., 1889.

⁽³⁾ 173, P. R., 1889.

⁽⁴⁾ 4, P. R., 1888.

⁽⁵⁾ 89, P. R., 1888.

⁽⁶⁾ 149, P. R., 1888.

⁽⁷⁾ 71, P. R., 1892.

⁽⁸⁾ 32, P. R., 1892.

⁽⁹⁾ 11, P. R., 1896.

No. 42.

Before Mr. Justice Reid.

RADHA RAM,—(PLAINTIFF),—PETITIONER,

Versus

HIRA AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} REVISION SIDE.

Civil Revision No. 1017 of 1900.

Jurisdiction—Valuation of suit—Suits Valuation Act, 1887, Section 8—Suit for the cancellation of an auction sale of a house sold in execution of a money decree not exceeding Rs. 100—Punjab Courts Act, 1884, Section 3.

The value, for purposes of jurisdiction, of a suit for the cancellation of an auction sale of a house sold in execution of a money decree is the value of the judgment-debtor's interest in the house in suit assessed by the auction sale and not the value the plaintiff chose to assess it at.

Sheo Devi Ram v. Tulsi Ram ⁽¹⁾, *Bhai Harnam Singh v. Mussammat Bhagwan Devi* ⁽²⁾, *Harnam Singh v. Kirpa Ram* ⁽³⁾, *Mohhusudun Koer v. Rukhal Chunder Roy* ⁽⁴⁾, and *Sohan Lal v. Gulab Mal and others* ⁽⁵⁾, followed.

Petition for revision of the decree of P. Thompson, Esquire, District, Judge, Lahore, dated 25th January 1900.

Brandon, for appellant.

Bhagwan Das, for respondents.

The judgment of the learned Judge was as follows:—

REID, J.—A preliminary objection has been raised, by the pleader for the respondents, that the application is barred by limitation. 15th Jan'y. 1901.

From the record it appears that a considerable period, from the 24th April to the 14th May 1900, was expended in attempts to procure a copy of the decree of the lower Appellate Court. I see no reason for not allowing the application to proceed. The sole question for consideration is whether the appeal from the decree of the Court of first instance was cognisable by the District Judge.

The suit was instituted by the son of a judgment-debtor, for cancellation of the auction sale of a house sold in execution of a money decree for Rs. 75 and costs, the whole amount decreed not exceeding Rs. 100.

The house in suit was subject to a mortgage and the rights and interests of the judgment-debtor as mortgagor were purchased by the decree-holder for Rs. 100. The pleader for the petitioner contends that the suit was for possession of a house, but this contention

⁽¹⁾ *I. L. R.*, XV All., 378.

⁽³⁾ *1, P. R.*, 1887 (F. B.).

⁽²⁾ *50, P. R.*, 1890.

⁽⁴⁾ *I. L. R.*, XV Calc., 104.

⁽⁵⁾ *50, P. R.*, 1896.

is obviously opposed to the plaintiff, and I see no reason for holding that the suit comes under either paragraph V, VI, IX or X (d) of Section 7 of the Suits Valuation Act.

In *Sheo Devi Ram v. Tulsi Ram* (1), it was held that the value for purposes of jurisdiction of a suit to set aside an adoption is not the value of the property which may possibly change hands if the adoption is set aside, but the value put upon his plaint by the plaintiff, and in *Bhai Hornam Singh and another v. Mussammal Bhagwan Devi and another* (2), it was held that in a suit for a declaration that a certain house of the value of Rs. 6,000 was liable to attachment and sale in execution of a decree for Rs. 429, the value of the subject-matter for purposes of jurisdiction was the amount of the decree sought to be realised out of the property, and not the value of the property itself. The decree being for less than Rs. 100 and the appeal from the decree being cognisable by the Court of the District Judge, it would naturally follow that appeals from orders passed in execution of the decree would be appealable to the same Court, and I see no reason against a suit to contest a sale in execution and an appeal from the decree in such suit being governed by the same rules of jurisdiction. A Full Bench of this Court in *Harnam Singh v. Kirpa Ram* (3) said "we think" "it clear that the value of a suit for the purposes of jurisdiction under the Punjab Courts Act, 1884, with reference to the definition of " 'value' contained in Section 3 of that Act is not necessarily "identical with the value of the property to which the suit relates, "when it relates to any property," and in *Modhusudan Koer v. Rakhal Chunder Roy* (4), following rulings of all the other High Courts, a Division Bench held that in a suit under Section 283 of the Code of Civil Procedure to test the question whether a property which had been attached in execution, was liable to pay the claim of the creditor, the amount by which the jurisdiction of the Court was to be settled was the amount in dispute, and that the amount in dispute was the amount which the decree-holder would recover if successful, and that the only amount which he would recover would be the amount of his debt and not the value of the property attached, unless the two amounts happened to be identical. In the present case the amount in suit would be the value of the judgment-debtor's interest in the house in suit, assessed by the auction sale at Rs. 100. In *Sohan Lal v. Gulab Mal and others* (5), I expressed the opinion that there was nothing in Book Circular No. VII,—1738 of 1889, dated April 9th, 1889, or

(1) I. L. R., XV All., 378. (3) I. P. R., 1887. (F. R.)

(2) 50, P. R., 1890.

(4) I. L. R., XV Calc., 104.

(5) 50, P. R., 1896.

at page 185 of the Rules and Orders of this Court, Volume I, Judicial, or in the Court Fees and Suits Valuation Acts to justify the arbitrary valuation of a suit at several times the amount at which it is valued for purposes of Court fees, and I hold that the mere fact that the plaintiff-petitioner chose to assess the value of the house sold at Rs. 1,500 for purposes of jurisdiction, while he correctly valued his suit at Rs. 100 for purposes of Court-fees does not oust the jurisdiction of the Court of the District Judge.

Under Section 8 of the Suits Valuation Act, the value as determinable for the computation and the value for purposes of jurisdiction is the same, and that value is Rs. 100. I reject the application with costs.

Application dismissed.

No. 43.

Before Mr. Justice Chatterji and Mr. Justice Maule.

BAZ KHAN AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

SULTAN MALIK AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 515 of 1898.

Abandonment—Abandonment of land—Extinguishment of proprietary rights—Limitation—Reversioners, suit by—Adverse possession—Successive female heirs—Possession adverse to the female adverse to the reversioners—Limitation Act, 1877, Schedule II, Articles 141, 142.

On the death of the original owner about twenty years ago his widow succeeded him, she being unable to pay a sum of Rs. 98-10-0 due to Government, on account of land revenue, left the village and went away to her parents. The plaintiffs being the reversioners were asked to take up the land and pay the revenue due which had been realized from the defendant as *lambardar* who was also a distant relation, declined saying that after the death of the widow they would set up their claim in the form they might consider proper. The defendant then asked to be put in possession of the land as he had already paid the amount due from the defaulter and agreed to give it up after cutting the standing crop whenever the widow paid him Rs. 98-10-0. Thereupon the widow was entered as absent and the defendant in possession of her land. Shortly after the widow died without having made any effort to regain her land. In 1885 the land was mutated in the name of the widow's husband's mother who was also an absentee, defendant being recorded in possession as before. The mother-in-law died ten years before the present suit and the plaintiffs now claimed possession from the defendant on payment of the sum of Rs. 98-10-0 paid by him on account of the land. The defendant pleaded limitation and also

abandonment of their rights by the plaintiffs on the widow's leaving the village and the land being offered to them by the Revenue authorities.

Held, that no abandonment had been proved either on the widow's or plaintiffs' part. The fact of the widow's going to her parents at a time of distress did not indicate any intention to give up her life-interest in her land, but even had any such intention on her part been proved, the plaintiffs would not have been bound as they did not derive their title from or through her. The plaintiffs' declining to take land in 1879 when called upon by the Revenue authorities cannot be held to amount to an abandonment as their title to possession had not accrued at that time.

Held, further, that the circumstances under which the defendant obtained possession of the widow's property in 1879 and the mutation in her mother-in-law's name in 1885 after her death indicated the nature of the defendant's possession. In order to be adverse the possession must be like that of an owner and with an intention on the part of the holder to hold the property for himself as such. The mere holding of the property without such intention does not confer a prescriptive title or extinguish that of the original proprietor out of possession.

Held, also, that Article 141 of the second Schedule of the Limitation Act, 1877, was applicable, and that the plaintiffs' suit would not have been barred even if adverse possession of defendant in the lifetime of the widow had been proved, as plaintiffs' right to sue did not accrue until after the death of the mother-in-law of the widow, and that the discontinuance of possession which might have been fatal had the person absconding in 1879 been a male could not for the same reason bar the application of Article 141, and therefore Article 142 had no application.

Sainditta v. Ghulaman ⁽¹⁾, *Hanuman Prasad Singh v. Bhaganti Prasad* ⁽²⁾, *Tika Ram v. Shama Charan* ⁽³⁾, *Mussammat Iachhan Kunwar v. Anant Singh* ⁽⁴⁾, and *Nobin Chundur Chukerbutty v. Issur Chundur Chukerbutty* ⁽⁵⁾, referred to. *Sham Lal Mitra v. Amarendro Nath Bose* ⁽⁶⁾, *Sri Nath Kur v. Prosunno Kunwar Ghose* ⁽⁷⁾, *Ramkali v. Kedar Nath* ⁽⁸⁾, *Hari Nath Chatterjee v. Mothur Mohan Goswami* ⁽⁹⁾, *Venkataramayya v. Venkatalakshamma* ⁽¹⁰⁾, *Ranchordas v. Parvati Bai* ⁽¹¹⁾, *Chiragha and others v. Mahtaba and others* ⁽¹²⁾, *Vundravandas v. Cursondas* ⁽¹³⁾, *Sai-ulla v. Mussammat Laila* ⁽¹⁴⁾, and *Sardari Mal v. Khan Bahadur Khan* ⁽¹⁵⁾, followed. *Muham-mad Amanulla Khan v. Badan Singh* ⁽¹⁶⁾, explained.

Further appeal from the order of J. A. Anderson, Esquire, Divisional Judge, Amritsar Division, dated 29th January 1898.

Ganpat Rai, for appellants.

Lal Chand and Ishwar Das, for respondents.

⁽¹⁾ 85, P. R., 1892.

⁽²⁾ I. L. R., XIX All., 357.

⁽³⁾ I. L. R., XX All., 42.

⁽⁴⁾ I. L. R., XXII Calc., 445.

⁽⁵⁾ 9, W. R., 505.

⁽⁶⁾ I. L. R., XXIII Calc., 460.

⁽⁷⁾ I. L. R., IX Calc., 934.

⁽⁸⁾ I. L. R., XIV All., 156.

⁽⁹⁾ I. L. R., XXI Calc., 8.

⁽¹⁰⁾ I. L. R., XX Mad., 493.

⁽¹¹⁾ I. L. R., XXIII Bom., 725, P. C.

⁽¹²⁾ 79, P. R., 1898.

⁽¹³⁾ I. L. R., XXI Bom., 646.

⁽¹⁴⁾ 74, P. R., 1895.

⁽¹⁵⁾ 11, P. R., 1899.

⁽¹⁶⁾ 23, P. R., 1890; I. L. R., XVII Calc., 137, P. C.

The facts of the case are fully stated in the following judgment delivered by

CHATTERJI, J.—The material facts of this case are briefly 23rd Jany. 1901. these. The land in dispute belonged to one Ilahi Bakhsh, on whose death, his widow Mussammat Begam succeeded him. In 1879 she being unable to pay the revenue left the village and went away to her parents. The revenue was then in arrear for three harvests and the land was lying uncultivated. The patwari made a report of these facts on 18th August 1879 to the Tahsildar, and asked for an arrangement to be made for the defaulters' lands and for the realization of the arrears which then amounted to Rs. 98-10-0. The reversioners of Mussammat Begam, including the plaintiffs, were asked to take up the land and to pay the revenue due which had been realized from Ali Gauhar, lambardar, who was also a relation though a more distant one. They declined, saying that they would take steps to assert their rights when the widow died. Ali Gauhar then stated that he had already paid the amount due from the defaulter and asked to be put in possession of her land and agreed to give it up after cutting the standing crop whenever she re-paid him Rs. 98-10-0. Upon this, the Naib-Tahsildar recorded an order on 9th February 1880, reciting that Mussammat Begam had gone away owing Rs. 98-10-0 on account of revenue which was paid by Ali Gauhar, and that he was put in possession of her land which was lying uncultivated on condition of his giving it up to her when she re-paid the amount. Mussammat Begam was entered as absent and Ali Gauhar in possession.

Shortly after Mussammat Begam died without making any effort to regain her land. In January 1885, the land was mutated in the name of Mussammat Bhari, the mother of her husband, also as an absentee, Ali Gauhar being recorded in possession as before. Mussammat Bhari died about ten years before the suit and the plaintiffs now claim possession from the heirs of Ali Gauhar on payment of the losses that may have been paid by him on account of the land.

The defendants pleaded limitation and also abandonment of their rights by the plaintiffs when, on Mussammat Begam's absconding, the land was offered to them by the Revenue officer.

The first Court held that the suit was time-barred and that there was abandonment on the part of both Mussammat Begam and the plaintiffs. The Divisional Judge was of opinion that Ali Gauhar had adverse possession from 1880, if not earlier, and agreed with the lower Court as to abandonment by the plaintiffs.

I think the finding as to abandonment either by Mussammat Begam or by the plaintiffs cannot be supported. The word means, if any thing, a conscious renunciation of rights of ownership, and I cannot find any proof of this. Mussammat Begam left on account of poverty and inability to pay revenue. The revenue was in arrear for three harvests when the patwari's report was made in August 1879. She cannot be assumed to have left more than a year and a half before it was made and probably not so long before. She died in her parents' house at *mausa* Khan Malak in May 1880, so that at the time of her death she was absent for a little over two years. Her going to her parents at a time of distress does not indicate any intention to give up her life-interest in her land and she did no other act which in the least shows any such intention. The natural presumption from the known facts probably is that she meant to resume her land when better times came, but in any case, no abandonment is shown, on her part.

Nor is abandonment by the plaintiffs proved. They declined to pay the amount due to Ali Gauhar and to take the land in 1879, but they were then mere reversioners and would have been bound to return the land to the widow if she returned, and they were unwilling for the sake of such a defeasible title to attempt to raise the money which Ali Gauhar was to receive and which possibly owing to the hard times was a matter of difficulty for them. Their title to possession had not accrued and this they did not abandon, but on the contrary expressly reserved in their statement. A man cannot be held to abandon what he does not possess. The plaintiffs' right to possession accrued only ten years ago on Mussammat Bhari's death, and there could be no abandonment before that time. Abandonment since is not only not proved, but would be insufficient to bar the claim as twelve years have not yet elapsed. *Sain Ditta v. Ghulaman* ⁽¹⁾. Plaintiffs of course could have estopped themselves from suing by promising not to sue when the right came into existence, but this is not what they said, but the reverse.

I do not think it necessary to speculate much on abandonment by Mussammat Bhari. There is no such finding and nothing is known about her mental attitude with respect to the disputed property. Plaintiffs who do not derive their right from, or through her, are not bound in any case by any intention she may have had of giving up her rights which only amounted to a life-interest. In the utter absence of evidence it cannot be assumed that she meant to do anything more.

(1) 85, P. R., 1892 (F. R.).

The finding of the Divisional Judge as to Ali Gauhar's adverse possession is, I think, equally untenable. Article 144 of the Limitation Act in terms applies only if there is no other applicable, and I shall presently show that other articles specially provide for a case of this kind. In order to make out adverse possession there must be possession as owner and an intention on the part of the person in occupation of the property to hold it for himself. The mere holding of the property without such intention does not confer a prescriptive title or extinguish that of the original proprietor out of possession. This is an elementary principle of jurisprudence.

Now when Ali Gauhar obtained possession, he did not set up any right or show any intention to hold the land for himself as owner. He had paid certain losses and he was put in possession in lieu of them on plaintiff's refusal to recoup him for them, and he expressly agreed to restore the land to Mussamat Begam on her making the payment. The widow held only a life-interest, and this promise according to the law of the land, of which Ali Gauhar was fully aware, inured to the benefit of her reversioners. I mean it is impossible for a moment to contend that supposing the widow to have died the next day, he could refuse to surrender the land to the next reversioner claiming it on the ground that the promise was personal to the widow. The ordinary and obvious interpretation of the promise would be the above, and the legal effect of it cannot be otherwise. Ali Gauhar's possession at best was that of a person having a charge on the land for Rs. 98-10-0 and holding it as long as that sum was not paid. He might not have been a mortgagee *co-nomine*, but had he been put in possession or obtained possession without any such stipulation, he could not have in any case pleaded limitation before the lapse of twelve years from the commencement of such possession. *A fortiori* under the statement recorded in 1879-80, and the agreement then made, he could not plead limitation before twelve years from the date he set up adverse possession which he never did even if it be conceded that Article 148 does not apply to a suit for recovery of immovable property held under a charge, the distinction between a charge and a mortgage not being clearly defined in the Limitation Act as it is in the Transfer of Property Act and no special provision made for suits of the above description. It appears to me also clear that the Revenue officer made the entry as to the agreement to restore the land in the interests of the widow, and though he was not acting as her agent, it was competent to her to accept his act and to sue Ali Gauhar under the terms of agreement. Plaintiffs as her reversionary heirs are in the same

position, and Section 200 of the Indian Contract Act is no bar to this. Lastly, the mutation in Mussammat Bhari's name in 1885 which was presumably known to Ali Gauhar or his heirs also indicates that at that time, he or they had not receded from the terms fixed in 1880, and it does not appear that at any subsequent period a different line of conduct was set up. I shall notice further on the authorities cited in connection with the question of adverse possession.

In any case Articles 142 and 144 cannot both apply and the first Court has apparently applied the former which appears to me to cover the facts better than Article 144. All that is proved is that Mussammat Begam left the land without putting any one in charge and arranging for payment of revenue or for cultivation, that Ali Gauhar as lambardar paid the arrears of revenue, and, on plaintiff's refusal to take the land was put in possession on condition of restoring it to Mussammat Begam on payment of his dues. Mussammat Begam then discontinued possession in 1879 or 1878, and did not claim possession afterwards. Plaintiffs now sue after the lapse of nearly seventeen years. When a plaintiff sues for possession of immovable property upon a discontinuance of possession or dispossession more than twelve years from its date, his suit is barred and it is not necessary to prove the adverse possession of the defendant. *Muhammad Aman-ulla Khan v. Badan Singh* ⁽¹⁾.

The word plaintiff of course includes plaintiff's predecessor in title from whom his right to sue has been derived. The Article in question would exactly apply to the present claim and bar it if the original holder of the land in 1879 had been a male. But here the holder was a female, a widow with only limited interests, and this raises the question whether Article 141 is not applicable to the suit. The first Court apparently holds that it does not, while the Divisional Judge has not discussed the point.

In my opinion, the words of Article 141 appear to exactly cover the facts of this case. Plaintiffs claim possession of immovable property to which they are entitled on the death of a Muhammadan female as reversioners. The estate did not belong to Mussammat Begam in full ownership, and plaintiffs are not her heirs, but heirs of her husband, whose succession was postponed for the period of her life. If the Article applies, plaintiffs' suit is within time counting it from the death of the second female entitled to the land, *viz.*, Mussammat Bhari. It is true that the land passed into the possession of Ali Gauhar in Mussammat Begam's

(1) *I. L. R.*, XVII Calcutta, 137; 23, P. R., 1890, P. C.

lifetime, and that Mussammat Bhari never had possession. But she also had only a life-interest and it is not disputed that she was Mussammat Begam's legal successor. Plaintiffs' right accrued only after her death, so that the fact that she intervened between Mussammat Begam's death and the accrual of the plaintiffs' right does not make any difference to the latter. The Article is equally applicable taking her to be the last female heir for life before the plaintiffs. Where there are successive female heirs with limited rights entitled to succeed before the male reversioners, limitation does not begin to run until the death of the last female heir. *Sham Lal Mitra v. Amarendra Nath Bose* (1).

But, it is argued that where the estate is held in adverse possession in the lifetime of the widow, or the widow's estate is never allowed to come into possession, the time runs against the reversionary heirs and they are barred after the lapse of twelve years, Article 141 notwithstanding. Respondent's counsel quotes *Hanuman Prasad Singh v. Bhagauti Prasad* (2) and *Tika Ram v. Shama Charan* (3). The latter judgment professes to follow the former in which there is an expression of opinion on the part of Burkitt, J., after a review of the authorities that "where property the estate in which has descended to a female heir never reaches her hands, but is held adversely to her by a stranger, the cause of action for a suit for the recovery of the property accrues at the commencement of the adverse possession by the stranger, and a suit to enforce that cause of action will be barred both against the female heir and against the reversioner after the expiration of the statutory period of limitation counting from the commencement of the adverse possession, the stranger having after the expiration of that period acquired an absolute indefeasible title to the property," and that Articles 142 of Act IX of 1871 and 141 of Act XV of 1877 had made no alteration in this rule of law. The learned Judges in the later case also say that their Lordships of the Privy Council held the same view in *Mussammat Lachan Kanwar, &c. v. Anant Singh* (4).

I have already pointed out that no question of adverse possession arises in this case and shown that Ali Ganhar's possession was at its inception, not as owner on his own behalf, and was not then or at any time subsequently adverse to Mussammat Begam or Mussammat Bhari. The facts of the Allahabad cases were quite different from those of the present case and in *Hanuman Prasad Singh v. Bhagauti Prasad* (2) the decision was in the reversioners' favour. I must say that I have considerable difficulty in accepting the

(1) *I. L. R.*, XXIII Calc., 460.(2) *I. L. R.*, XX All., 42.(3) *I. L. R.*, XIX All., 357.(4) *I. L. R.*, XXII Calc., 445.

doctrines laid down in them. There are two Full Bench decisions, one of the Calcutta High Court, *Sri Nath Kur v. Prosunno Kumar Ghose* ⁽¹⁾, and the other of the Allahabad Court, *Ram Kali v. Kidar Nath* ⁽²⁾, which lay down the contrary rule that under the two later Limitation Acts adverse possession in the lifetime of the female heir does not avail against her reversioner who has twelve years after her death to sue to recover possession. I am not prepared to admit that these decisions have been expressly or impliedly set aside, so far as the above statement of the law is concerned by the Privy Council in *Mussammat Luchhan Kunwar's* case. They are not referred to in the judgment of their Lordships, which ought in my opinion to be construed with reference to the peculiar facts of the case before them. It appears that there had already been a previous suit by Luchhan Kunwar in 1875, which had been held to be barred by limitation as it undoubtedly was under Act XIV of 1859, which contained no provision corresponding to Articles 142 of Act IX of 1871 and 141 of Act XV of 1877. *Nobin Chundur Chukerbutty v. Issur Chundur Chukerbutty* ⁽³⁾.

The original owner Mangal Singh had died in 1859. The contention before their Lordships was that Jit Kunwar, Mungal Singh's widow, who took wrongful possession of his property to the exclusion of his son and son's widow, Mussammat Luchhan Kunwar, had not done so claiming an absolute title, but only as a widow, and their Lordships say that the question before them was in what capacity she took possession. They held that she took possession as an absolute owner having in reality no such title, and that this "being the case the suit would be barred by "limitation as it was held to be in 1875." It is obvious to my mind that the effect of the previous decision which was binding on the reversioners could not be got rid of, and that the second suit was held by their Lordships to be barred by time for the same reasons that the suit in 1875 was held so. If under Act XIV of 1859, the right had lapsed by efflux of time when the former suit was instituted, it could not be revived by the enactment of a new law of limitation. This is a well-established principle and has been affirmed in numerous cases, see *Hari Nath Chatterjee v. Mothur Mohun Goswami* ⁽⁴⁾. *Venkataramayya, &c., v. Venkatalakshamma* ⁽⁵⁾, appears to support the view I am taking of the law which is also that of the latest authority on the subject (*Runchordas v. Parvati Bai* ⁽⁶⁾). This judgment

⁽¹⁾ I. L. R., IX Calc., 934.

⁽²⁾ I. L. R., XIV All., 156.

⁽³⁾ 9 W. R., 505.

⁽⁴⁾ I. L. R., XXI Calc., 8.

⁽⁵⁾ I. L. R., XX Mad., 493.

⁽⁶⁾ I. L. R., XXIII Bom., 725, Cr.

of their Lordships is directly on the scope of Article 141 of the present Limitation Act, and they remark that the right of the reversioner is not derived from or through the widow (page 736). Another point to be noted is that the scheme of the last two Limitation Acts takes no cognizance of causes of action. They contain elaborate Schedules which give the nature of the suit and state the time from which the period begins to run. Now in a suit of the kind mentioned in the first column of Article 141, which the present claim undoubtedly is, such time is clearly stated in the third column to be the date of the female's death. To my mind, therefore, the argument based on the accrual of the cause of action which is a prominent feature in the scheme of the Limitation Act of 1859, loses much of its force when applied to Acts so differently framed as the two later Limitation Acts. The learned Judges of the Allahabad Court do not seem to have paid due regard to this consideration, which is referred to in the judgment of the Privy Council last quoted. It appears to me that the express words of Article 141 of Act XV of 1877 ought to be got rid of by an argument of greater cogency. See also *Chiraga and others v. Mahtaba and others* ⁽¹⁾, and *Vendhravan Das v. Curson Das* ⁽²⁾.

I hold, therefore, that even if adverse possession of Ali Gaulhar and his heir in the lifetime of the widows had been proved, Article 141 would still have applied, and the suit would not have been barred by time.

The discontinuance of possession which would have been fatal had the person absconding in 1879 been a male cannot for the same reasons bar the application of Article 141, and, therefore, Article 142 has properly no application. It has been held that in the case of alienations by a widow her discontinuance of possession does not prevent Article 141 governing her reversioner's suit for possession, and similarly if she purposely allows a third party to retain possession and makes no claim out of favour to him. See *Saidulla v. Mussammatt Laila* ⁽³⁾ at page 366. The discontinuance of possession here cannot stand on a higher footing. The titles of the widow and the reversioner are distinct, and the former can only represent the latter in matters connected with the estate in cases of alienation for necessity, or where she in good faith seeks to protect it from outsiders in the common interests. The act of discontinuance or non-claim cannot be held to possess the latter character. The widow could discontinue only her own possession, she could not in doing so claim to represent the reversioners. In fact

⁽¹⁾ 79 P. R., 1898. ⁽²⁾ I. L. R., XXI Bom., 646.

⁽³⁾ 74 P. R., 1895.

she did not in the least profess to do so, and the reversioners made it clear at the time that her act was good only for her life and did not bind them. The same remark applies to Mussammat Bhari's making no claim. I am unable to see, therefore, how Article 142 can be held to apply, and how the operation of Article 141 can be excluded. If it cannot, plaintiffs' claim must be held to be within time.

I hesitate the less to adopt this conclusion, because, I consider the widow's estate under Customary law to be essentially a life-estate, with a few incidents superadded which are capable of easy explanation. I believe this to be also the case under Hindu Law. Her succession to her husband's property has really grown out of her right to maintenance, and is nothing but a compendious and convenient mode of enabling her to maintain herself. The liability of the reversioners to be bound by her acts when she alienates for necessity or defends the estate in good faith from hostile claims is an inevitable consequence of her being entrusted with possession and management of immovable property. *Sardari Mal and others v. Khan Bahadur Khan* ⁽¹⁾ at page 62 and the authorities therein quoted, *Roe and Rattigan's Tribal Law in the Punjab*, page 60, *Mayne's Hindu Law*, 6th Edition, Sections 523, 524 and 607. Outside the strict requirements of these occasions, however, she is a mere holder for life, and her acts and omissions have no effect beyond it.

I have already said that the statement of the plaintiffs in 1879 does not benefit the defendants in any way. Ali Gauhar knew at the time that the reversioners reserved their claim, and probably he did not mind as he had no idea then of acquiring the land for himself. Plaintiff's conduct in 1879-80, and their delay in suing, gives an appearance of hardship to defendants' case, but does not operate to extinguish the former's right on any equitable ground.

I would accept the appeal and decree the plaintiffs' claim on payment of Rs. 98-10-0, but let the parties bear their own costs throughout.

28th Jany. 1901.

MAUDE, J.—I agree with my learned colleague in the view that Ali Gauhar never set up an adverse title as against the plaintiffs until after the death of Mussammat Bhari, when they claimed the land. Therefore, their suit cannot be held to be barred by limitation. The appeal is accepted, and the plaintiffs' claim decreed on payment of Rs. 98-10-0 to the defendant, each party paying its own costs throughout the litigation.

Appeal allowed.

(1) 11 P. R., 1899.

No. 44.

Before Mr. Justice Reid and Mr. Justice Robertson.

KHAIR MUHAMMAD,—(DEFENDANT),—APPELLANT,

Versus

ABDUL GHAFAR KHAN,—(PLAINTIFF),—

AND

FIROZ,—(DEFENDANT),—

} RESPONDENTS. } APPELLATE SIDE.

Civil Appeal No. 645 of 1898.

Registration—Registration of a document under Section 24 of Act III of 1877—Finding of Registrar—Validity.

Where a sale-deed was presented for registration within six months of its execution and was dealt with under Section 24 of the Registration Act, the vendor admitting execution but pleading non-payment of a large portion of the consideration, and was registered on payment of a penalty under that section.

Held, that the Registrar's finding as to the existence of the circumstances mentioned in Section 24 of the Registration Act must be accepted and the validity of the registration cannot be questioned in a suit instituted by the vendee nearly five years after registration.

Rya Raghoba Kamat v. Anapurna Bai (1), and *Bhagat Singh v. Ram Narain* (2) distinguished.

Further appeal from the Decree of F. Field, Esquire, Additional Divisional Judge, Peshawar Division, dated 10th March 1898.

Fazal Din, for appellant.

Sham Lal, for respondents.

The judgment of the Court (so far as is material for the purposes of this report) was delivered by

REID, J.—The fourteen grounds of appeal, filed by the pleader 31st Jan'y. 1901. for the appellant, have been argued as three—

1. That the plaintiff-respondent's deed of sale, although prior in date to the appellant's mortgage, has not priority over the latter, inasmuch as it must be treated as unregistered, having been registered more than four months after execution.
2. That the plaintiff-respondent has not proved that full consideration for the sale passed before the appellant's mortgage-deed was executed.
3. That, in any event, the appellant is entitled to payment of the sum found to be payable by the plaintiff-respondent before the latter can obtain possession,

and that the decree of the lower Appellate Court should have made this sum payable to him instead of to the defendant-respondent.

In support of the first ground the pleader for the appellant cites *Raya Raghoba Kamat v. Anapurna Bai kom Subalbhat* ⁽¹⁾ and *Bhagat Singh v. Ram Narain* ⁽²⁾, which are not in point. In the Bombay case it was held that "the accepting of a document for registration," after the expiry of the period mentioned in Part IV of Act XX of 1866, is not a mere defect of procedure, but that the Registrar, who registers a document so presented, acts without jurisdiction; Sections 22, 23 and 24 in Part IV of Act XX of 1866 correspond to Sections 23 and 24 of the Registration Act now in force.

In the Punjab case it was held, that if the mortgage-deed in suit was capable of being registered on the day on which it was registered, the effect of Section 47 of the Registration Act would be to render it operative, as a registered document, from the date of its execution, but that, as, under the provisions of Sections 23 to 26 of the Act, it was not capable of registration on the day on which it was registered, having been executed fifteen months before presentation for registration, the defect could not be cured by Section 87 of the Act, and the deed could not be regarded as having been duly registered within the meaning of Section 49. The sale-deed in suit was presented for registration within six months of execution and was registered on payment of a penalty, under Section 24 of the Act, the vendor admitting execution, but pleading that only Rs. 10 out of Rs. 1,000 sale consideration had been paid. The effect of Section 24 is to allow registration within eight months of execution under certain circumstances, and we must accept the Registrar's finding that such circumstances existed. The validity of the registration cannot be questioned in this suit, instituted by the vendee nearly five years after registration.

(The remainder of the judgment is not material for the purposes of this report—Ed., *P. R.*).

⁽¹⁾ 10 *Bom. H. C. R.*, 98. ⁽²⁾ 93 *P. R.*, 1883.

No. 45.

Before Mr. Justice Chatterji and Mr. Justice Maude.

CHAUDHRI LILA KISHEN AND OTHERS,—

(DEFENDANTS),—APPELLANTS,

Versus

CHAUDHRI HOA RAM,—(PLAINTIFF),—RESPONDENT.

APPELLATE SIDE.

Civil Appeal No. 944 of 1897.

Custom—Alienation—Gift—Immoveable property—Gift without delivery of possession—Revocation of gift by donor—Hindu Law.

Held, that the primary rule of decision in a case of gift in the Punjab is custom and possession is ordinarily necessary to complete it, and that even under Hindu Law a gift which the donor repudiated immediately after, and which he did not do all in his power to perfect and under which he did not give actual possession of the gifted property, is not valid.

Balmokand v. Bhagwan Das ⁽¹⁾, *Manbhari v. Naunidh* ⁽²⁾, *Raja Ram v. Ganesh* ⁽³⁾, and *Prema Shah v. Chet Ram* ⁽⁴⁾ distinguished, *Kalidas Multick v. Kanhaya Lal*, *Pandit* ⁽⁵⁾ relied on.

First appeal from the Decree of Lala Achhru Ram, District Judge, Multan, dated 30th April 1897.

Lal Chand, for appellants.

Grey and Muhammad Shah Din, for respondent.

The judgment of the Court was delivered by

CHATTERJI, J.—The material facts of this case are briefly these. 4th Feb'y. 1901
The property in suit belonged to one Chaudhri Kanhaya Lal, a Babla Bhatia of Shujabad, brother of Chaudhri Khem Singh. He had two daughters, both married, and a son who, however, predeceased him, leaving a widow Mussammat Nikki Bai. He had considerable landed property in two villages, Rukkan Hatti and Bangala. On 6th March 1896 he presented a petition before the Naib-Tabsildar, in which he stated that he had gifted all the property situate at Rukkan Hatti except the Macrindiwala well to his nephews, Lila Kishen and Narain, sons of Chaudhri Khem Singh, and given possession to them. The petition was dated 28th February 1896 and a similar petition couched in similar terms was presented in respect of the lands at Bangala. The donor was examined on 6th March and he then repeated the contents of the petitions, stating, however, that he had put the donees in possession on that day and prayed for mutation of names in their favour. In his deposition regarding Bangala he said that the gift had been made on that date. He subsequently sent a petition, dated 19th

⁽¹⁾ *I. L. R.*, XVI All., 185.

⁽²⁾ *I. L. R.*, IV All., 40.

⁽³⁾ *I. L. R.*, XXIII Bom., 131.

⁽⁴⁾ 38 P. R., 1899.

⁽⁵⁾ *I. L. R.* XI Cal., 121.

March 1896, in which he stated that the previous applications for mutation in favour of the donees had been made on the understanding that he was to be paid Rs. 32,000 cash, and that not having received that sum, he wished to revoke the gift under which he had not yet delivered possession. He, therefore, prayed that mutation might not be allowed. On 22nd March Kanhaya Lal was examined by the Tahsildar with reference to this petition and repeated its contents, and further stated that in case of his death all his nephews and not merely the two donees would be his heirs. On 9th April he sent another petition to the Deputy Commissioner of Mooltan, substantially to the same effect, in which he also complained of the conduct of his brother Chaudhri Khem Singh and claimed protection against him. On 10th April he executed a power-of-attorney, which was duly registered on the following day, in favour of Chaudhri Balkishen, a half-brother of the donees, appointing him his general agent for management of the property and all matters connected with it. On 13th April 1896 he died, leaving, besides the relations already mentioned, a widow Mussammat Wiran Bai and another nephew Chaudhri Hoa Ram, the son of another brother, the plaintiff in this case.

On 24th April 1896 Mussammat Wiran Bai and Nikki Bai registered an application reciting the fact of the gift and possession taken by the donees, and also that the deceased before his death had withdrawn his objections before them, and praying that mutation might take place in favour of the former. Mutation was accordingly sanctioned in accordance with the gift.

On 28th August 1896 the present suit was filed by the plaintiff, claiming a nine-seventeenth share of the property of Kanhaya Lal on the ground that he, as the son of the deceased's elder brother, was entitled to an extra share, and that the widow was only entitled to maintenance, and the daughters to nothing, and in the alternative a declaratory decree setting aside the gift, in so far as plaintiff's reversionary rights were concerned, if the widow was held entitled to a life-interest. He asserted that the gift was never actually made or perfected by possession and was invalid on that ground, and also because, the property being ancestral, Kanhaya Lal had no power to dispose of it to his prejudice.

The donees denied the competency of the plaintiff to sue in the presence of the deceased's daughters, and further pleaded that the gift was complete, and that Kanhaya Lal had full power of donation. The widow supported their defence.

Seven issues were framed by the District Judge, *vide* page 19 of the printed record.

The Court below found that plaintiff was competent to sue, that Kanhaya Lal's gift was not perfected and could be retracted, and that the donees were holding possession with the consent of the widow. He, therefore, granted plaintiff a declaratory decree protecting plaintiff's reversionary rights without going into the other issues. The donees appeal.

In this Court there has been no argument about the plaintiff's *locus standi*, the point having been practically abandoned in the lower Court. The real question for determination in this appeal is whether the gift was completed so as to be irrevocable by the donor; if this is decided in appellants' favour, the other issues will have to be gone into and disposed of, but if it is found in favour of the plaintiff the appeal must fail.

In our opinion there is no satisfactory proof of the gift having been made before the 6th January 1896. There is no deed, and the recitals of the petitions of 28th February are not consistent with the statements made on 6th March in which the donor said that he had made the gift and put the donees in possession that very day. In the absence of unequivocal evidence, the gift, being an oral one, must be held to have been made when the statements were made before the Naib-Tahsildar. The recitals in the petitions were really meant to be effective from the date the gift was announced before the authorities. This at once explains the discrepancies aforesaid, which are otherwise unintelligible. There is no reliable evidence of a definite act of donation and giving over of possession prior to the presentation of the petitions. Kanhaya Lal retracted the gift on 19th March and swore to that effect on the 22nd, and the petition, dated 9th April, and the power-of-attorney of the following date show his persistence in that intention, and a determination to treat the property as still his own. These being the facts, the contest in respect of the gift and its completion must be held to have arisen in the lifetime of the donor. The latter refused to act on the gift and retracted it and the defendants can only succeed if that gift actually reached a stage at which it was beyond the power of the donor to recall it. If they cannot show this, they cannot base their exclusive title to the disputed property on the gift.

The oral evidence on both sides is biassed and unreliable; the case must be decided on the documentary evidence. We have already said that there is nothing to show that the land was actually gifted before 6th March. We also do not find any satisfactory proof that the donees took possession of the gifted property at once, or before the 19th March 1896, when the donor

retracted the gift. He then denied having given possession and asserted that he was still in possession. His subsequent acts support this statement, but of course it is possible that he was induced to make it falsely by plaintiff and Lala Balkishen, who were injured by the gift. Having regard, however, to the circumstances of the gift and the fact that Kanhaya Lal remained recorded proprietor of the disputed land up to the date of his death, we think the defendants are bound to show by cogent evidence that they obtained possession and that the donor's control over his property had ceased before the 19th March. We find no satisfactory evidence as to this. The oral evidence is valueless and the deeds of rent, dated 16th, 17th and 18th March, are by no means sufficient to show that possession actually passed. Possibly the deeds are *genuine* so far as purchase of the stamps on the dates mentioned is concerned, but as the first Court points out they were apparently written behind the deceased's back and the time was not one for change of tenancy. In a real transaction of this kind under the circumstances, the signature of the deceased would have been obtained. The deeds cover a very small fraction of the property in suit. We do not think there was any change of possession between 6th March and the 19th, and that the gift remained a verbal gift without possession.

Mr. Lal Chand argues that possession is not necessary to complete a gift under Hindu Law, that after his statement of the 6th March the donor was not competent to repudiate his act, and that he could be forced to give effect to it. We cannot accede to this contention in its entirety. The cases quoted by the learned counsel do not support his position. Mr. Mayne has discussed the question as to the necessity of possession to perfect a gift under Hindu Law in pages 481-87 of his work. He begins by stating that possession has been laid down as necessary, and he explains what the text-writers mean on the subject, while the extract he quotes from the *Mitakshara* shows what are the essentials of the acceptance of a gift without which it has no effect in the case of immovable property. According to the last-named authority, as there can be no corporeal acceptance without enjoyment of produce, it must be accompanied by some little possession; otherwise the gift is not complete. Mr. Mayne does not dispute that the rule as to possession being essential is generally accepted, and in Section 385 he proceeds to explain how it arose. In the case of *Balmukund v. Bhagwan Das* ⁽¹⁾ the facts were quite different. The dispute there was not between the donor and the donee, and the former had done all she could to perfect the gift. She regis-

(1) I. L. R., XVI All., 185.

tered the deed and delivered it to the latter and never repudiated it. The same remark applies to *Munbhari v. Naunidh* ⁽¹⁾, which it follows. So also in *Raja Ram and another v. Ganesh* ⁽²⁾. The donor had done all in his power to give effect to the gift, and it was held that by a subsequent will executed more than two years after its date he could not revoke it. In *Prema Shah v. Chet Ram* ⁽³⁾ the gift was perfected by mutation of names, and the donor never revoked it, though he included the gifted property in a mortgage to a creditor. The other cases cited have no real bearing on the present discussion.

The true rule as regards the necessity of possession is given by their Lordships of the Privy Council in *Kali Das Mullick v. Kanhaya Lal, Pandit* ⁽⁴⁾, at page 135, *viz.*, "that if the donor "has not done all he could to perfect his contemplated gift, he cannot "be compelled to do more, which applies to all cases of voluntary "contracts and transfers." Moreover, the primary rule of decision in a case of gift in the Punjab is custom. As laid down in Section 5 of the Punjab Laws Act and *Prema Shah v. Chet Ram* ⁽³⁾, and it has been repeatedly held that possession is ordinarily necessary to complete a gift. Rattigan's *Digest*, Section 60.

In the present instance the donor did not do all in his power to perfect the gift. We have found that he did not actually give possession, though he said on 6th March that he had done so and he repudiated the gift and asserted his own possession on 19th March. Under the circumstances had the donees been suing the deceased for possession, we should not have been able to deprive him of all his property on the mere statement of 6th March, and the facts of the case appear to raise doubts of his act being a deliberate, well-thought-out and firmly willed transaction. It would have been contrary to equity and good conscience at least to have given such effect to the statement of an old man stricken with mortal disease who so soon withdrew it and who died a little more than a month after. Defendants donees are in the same position now as they would have been in the donor's lifetime. His death cannot validate a gift which was invalid against him. The widow's admission has been rightly disregarded by the lower Court, as the consideration for it is obviously the agreement executed by Chaudhri Khem Singh, the father of the donees, the very day her application for mutation was executed.

We uphold the decree of the District Judge and dismiss this appeal with costs.

Appeal dismissed.

⁽¹⁾ *I. L. R.*, IV All., 40.

⁽³⁾ 38 P. R., 1899.

⁽²⁾ *I. L. R.*, XXIII Bom., 131.

⁽⁴⁾ *I. L. R.*, XI Cal., 121.

No. 46.

Before Mr. Justice Clark, Chief Judge.

DEBI SAHAI,—(PLAINTIFF),—APPELLANT,

Versus

GANESHI LAL AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Civil Appeal No. 921 of 1900.

Principal and agent—Badni (wagering) contracts—Void contract—Suit for profits received by defendants as plaintiff's agents—Liability of agent to render accounts to his principal—Contract Act, 1872, Sections 30 and 213.

Defendants as plaintiff's agents arranged with third parties for the delivery to plaintiff of 20,000 maunds of gram on a certain date, and three weeks after sold the said gram as his agents at a profit; the plaintiff sued the defendants for differences between the purchase and sale price after deducting the commission to which the defendants were entitled. The defendants admitted the purchases and sales but pleaded that the transactions were *badni* and that they had realized no profits.

Held, that as there was never any intention that the gram should be delivered, and it was only intended that differences should be settled, the transactions were *badni* and void under Section 30 of the Contract Act, but not illegal, and the defendants were liable to the plaintiff for any profits received by them.

The defendants as agents being bound to render proper accounts to the plaintiff, under Section 213 of the Act, which they had failed to, and in the absence of any objection on their behalf as to the amount of profits calculated, the plaintiff was entitled to a decree for the amount claimed.

Ragnath Sahai v. Mamraj ⁽¹⁾ and *Telu Mal v. Subha Singh* ⁽²⁾ followed. *Doshi Talakshi v. Shah Ujamsi Velsi* ⁽³⁾ distinguished.

Further appeal from the Decree of W. A. Harris, Esquire, Divisional Judge, Delhi Division, dated 11th May 1900.

Lal Chand, for appellant.

Madan Gopal, for respondents.

The judgment of the learned Chief Judge was as follows:—

12th Feby. 1901. CLARK, C. J.—The allegations in the plaint were that defendants as plaintiff's agents on 14th *Sawan Sudi, Sambat 1953*, arranged with third parties for the delivery to plaintiff of 20,000 maunds of gram on the 21st October 1896 at rates of Re. 1-14-9 and Re. 1-14-8½ per maund.

That defendants as plaintiff's agents some three weeks after on 7th *Bhadon Sudi Sambat 1953*, sold the said 20,000 maunds realizing the prices at Re. 1-15-9, Re. 1-15-8½ and Re. 1-15-7½ per maund.

⁽¹⁾ 80 P. R., 1895.

⁽²⁾ 90 P. R., 1880.

⁽³⁾ I. L. R., XXIV Bom., 227.

The defendants were entitled to 4 annas per cent. commission on the purchase and sales, that after deducting this the plaintiff was entitled to Rs. 1,100, which he claimed from defendants with Rs. 100 interest at 6 per cent. per annum.

Defendants admitted the allegations in the plaint, but pleaded that the transactions were *badni* and that they had realized no profits.

Both Courts have found that the transactions were *badni*, and I see no reason to differ from them. I think that there was never any intention that the gram should be delivered, it was only intended that differences should be settled.

The Divisional Judge following *Ragnath Sahai v. Mamraj* ⁽¹⁾, has rightly held that defendants are liable to plaintiff for any profits received by them. That judgment lays down that, "under Section 222 of the Indian Contract Act, plaintiff, as defendants' employer, is bound to indemnify his agent against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him. As pointed out in *Telu Mal v. Subha Singh* ⁽²⁾, "wagering contracts are under Section 30 of the Contract Act void, but not illegal, and therefore when the agent or broker has paid losses incurred by the employer in the *badni* or wagering transaction, such losses, together with his brokerage fees, can be recovered by suit, the contract with the broker, which is collateral to the wagering contract, not being tainted with illegality by reasons of its connection with the wagering contract."

That was a case where the principal was held liable to his agent, but the same reasons apply to make the agent liable to his principal.

Counsel for defendants quoted *Doshi Tulakshi v. Shah Ujamsi Velsi* ⁽³⁾ against the liability, but this case was decided under Bombay Act, III of 1865, which provided that contract collateral to wagers cannot support a suit, but if it had not been for that local Act, the liability would have been recognised.

So far I am in agreement with the Divisional Judge, who holds that defendant is liable for anything that he received. The Divisional Judge then goes on to say that there is no proof that defendant realized anything; he says: "Plaintiff urges that defendants must have realized, and that in order to avoid having to pay these realizations to the principal they had destroyed their account books. *This is very likely*, but it is possible to

⁽¹⁾ 80 P. R., 1895.

⁽²⁾ 90 P. R., 1880.

⁽³⁾ I. L. R., 24 Bom., 227.

“conceive that defendants destroyed their books in order to
“destroy evidence against some other principal or principals in
“cases where profits had been realized, and that no profits had
“been realized in plaintiff’s case. The vanishing of the books
“is undoubtedly a matter against defendants, but then in wager-
“ing transactions I am of opinion that those concerned are not
“entitled to the benefit of any presumption such as those above
“described, especially when the exact sum of profit cannot be
“ascertained and cannot be checked by any means, for the names
“of plaintiff’s purchasers are not recorded anywhere. Under these
“circumstances it appears to me that the person who entered
“into wagering transactions should suffer for not having secured
“evidence in support of his claim.”

I am unable to agree with the views here expressed by the Divisional Judge, the possibility that defendants may have destroyed their books in order to avoid debts to other principals is an unfounded assumption by the Divisional Judge. Defendants’ statement was that they lost the books when bringing them to Court. I disbelieve this explanation, as the Divisional Judge did, and think that defendants are keeping back the books to avoid just claims.

Under Section 213 of the Contract Act, defendants were bound to render proper accounts to plaintiff, but defendants have not only kept back their books but they have failed to give plaintiff any particulars; they have said they do not know the names of the purchasers of the gram; they have admitted that in some cases they received the profits from sale transactions. The view of the Divisional Judge that plaintiff is not entitled to any presumption arising from defendants’ destruction of the books because the transactions were wagering transactions is, I think, wrong. The contract between plaintiff and defendants was collateral to the wagering contracts and was a lawful one, and as plaintiff can recover on the contract, he is entitled to the usual presumption arising from defendants making away with evidence which might be used against them.

The decision of the case turns on the question whether the *onus* lay on defendants of showing that they had not received the profits of the sales of plaintiff’s gram.

Defendants’ position in this case seems to be very much the same as the position of defendants in *Ragnati Sahai v. Mamraj* ⁽¹⁾, and defendants (agents) in that case undertook the settlement of all differences arising out of the *badni* transactions.

In this case plaintiff is a resident of Ferozepore and defendants are residents of Bhatinda; we find defendants buying for plaintiff and selling again for plaintiff without disclosing the names of the purchasers, and plaintiff accepting the sale and entering it up in his account, and shortly after writing to plaintiff and complaining that the differences had not been sent him. The nature of the transaction goes to show that defendants were responsible to plaintiff for payment of the differences; plaintiff had no means of judging of the solvency of the purchasers, whose names he did not know.

This opinion is confirmed by the non-production by defendants of the books which would have shown whether defendants had realized the profits or not.

I hold that it lay upon defendants to show that they had not realized the profits of the sale of plaintiff's gram to third persons and they have not done so.

No objection has been taken by defendants as to the amount of profit calculated by plaintiff, Rs. 1,200. I accept the appeal and give a decree for Rs. 1,200 with costs throughout.

Appeal allowed.

No. 47.

Before Mr. Justice Reid.

BAWA SANT SINGH,—(PLAINTIFF),--APPELLANT,

Versus

GANGA SINGH AND OTHERS,—(DEFENDANTS),--

RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 773 of 1900.

Custom—Succession—Chundavand and pagvand—Bedi Khatri of mauza Charinda, tahsil Zafarwal, Sialkot District.

In a case to which the parties were Bedi Khatri of mauza Chavinda, Zafarwal tahsil, Sialkot District, found that the plaintiff had failed to establish his allegation that the parties were governed by the *Chundavand* rule.

Further appeal from the Decree of Rai Bahadur Sothi Hukm Singh, Divisional Judge, Sialkot Division, dated 4th April 1900.

Gobind Ram, for appellant.

Sangam Lal, for respondents.

The judgment of the learned Judge was as follows:—

REID, J.—The question for decision is whether the *chundavand* 13th Feby. 1901.
or the *pagvand* rule of succession governs Bedi Khatri of mauza
Chawinda, tahsil Zafarwal, Sialkot District.

The plaintiff-appellant, who claims half the estate left by his father, alleges that the *chundavand* rule governs the family, and relies on the Settlement record of rights of 1855; a decision of the 22nd May 1872, by a Tahsildar Munsiff, in a suit filed by him against the respondent, Ganga Singh, at the time a minor, unrepresented by a guardian *ad litem*, which was not appealed; the evidence of one witness, who deposed that the *chundavand* rule governs the parties, and the evidence of the village patwari, who had been in office for three years only, and who deposed, when examined by interrogatories, that he had discovered three instances, in the Settlement proceedings of 1865, in which that rule was followed. He did not mention those instances when examined as a witness in Court, and counsel for the appellant is unable to state the dates of those instances.

The respondents rely on the evidence of three witnesses, who deposed that the *pagvand* rule governed the parties; on a decision by a Settlement Superintendent, February 6th, 1866, in the suit; *Chanda Singh and others v. Ganda Singh*; on the Settlement record of 1865, which declared *pagvand* to prevail except in *tahsil* Zafarwal, where *chundavand* prevailed; and on the Settlement record of 1892-93, which declared *pagvand* to have superseded *chundavand* among all tribes except among the Bhatti Rajputs of the Darp and Khadir assessment circle of the Raya *tahsil*.

The Settlement Officer added, "There is now no question that "all the tribes who have been consulted, with the exception noted "above, repudiate the *chundavand* law." Counsel for the appellant frankly admits that the decision of 1872 does not bind the respondents, and he cites it merely as an instance of a judicial decision in favour of *chundavand*. Having regard to the tribunal in which the suit was instituted, to the fact that the defendant was an unrepresented minor and to the fact that no appeal was filed the decision carries little weight.

On the evidence before me I hold that the plaintiff-appellant has failed to establish the allegation that the parties are governed by the *chundavand* rule and to rebut the presumption raised by the Settlement records of 1865 and 1892 in favour of the *pagvand* rule.

The appeal fails, and is dismissed with costs.

Appeal dismissed.

No. 48.

Before Mr. Justice Clark, Chief Judge.

MINA MAL,—(DEFENDANT),—PETITIONER,

Versus

RAI BAHADUR HARDHIAN SINGH,—(PLAINTIFF),—
RESPONDENT.

REVISION SIDE.

Civil Revision No. 305 of 1901.

Civil Procedure Code, 1882, Sections 588 (24), 622 and 647—Appeal—Guardian and Wards Act, 1890, Sections 12 and 48—Order of District Judge fixing the fee of a custodian of the property of the ward appointed under Section 12—Revision—Punjab Courts Act, 1884, Section 70.

Held, that no appeal lies from an order of a District Judge fixing the fee of a custodian of the property of a ward appointed under Section 12 of the Guardian and Wards Act, 1890, but that such an order can be revised under the authority of Section 48 of that Act, Section 70 of the Punjab Courts Act of 1899 although it repealed, re-enacted in a modified form Section 622 of the Civil Procedure Code.

*Petition for revision of the order of W. A. Harris, Esquire,
Divisional Judge, Delhi Division, dated 16th June 1900.*

Parker, for petitioner.

Oertel and Shadi Lal, for respondent.

The judgment of the learned Chief Judge was as follows:—

CLARK, C. J.—The District Judge under the Guardian and Wards Act has fixed the fee of a custodian of the property of the ward appointed under Section 12 of the Act at Rs. 2,000. 15th Feby. 1901.

The minor (who has now come of age), Mina Mal, and the custodian, Rai Bahadar Hardhian Singh, both appeal against this order.

The appeal professes to be under Section 588 (24), Civil Procedure Code, referring back to Section 503, Civil Procedure Code, but Section 503, Civil Procedure Code, refers to property “the subject of a suit or under attachment,” and no appeal lies under Section 503, Civil Procedure Code, as the property is not of this nature.

It is then argued that under Section 647, Civil Procedure Code, Sections 503 and 588 (24), Civil Procedure Code, are made applicable and a right of appeal given.

But it has been held that an appeal must be given by Statute or an authority equivalent to it and in deciding whether an appeal lies the nature of the order must be regarded. (*Minakshi Naidu v. Subramanya Sastri* (1).

(1) I. L. R., XI Mad., 26.

I hold therefore that no appeal lies. I am then asked to take up the case on revision.

The question then arises whether a revision lies. Under Section 48 of the Guardian and Wards Act a revision is allowed under Section 622, Civil Procedure Code, but Section 622, Civil Procedure Code, has been repealed by Section 6 of the Punjab Comts Act, XXV of 1899—can this section be considered to re-enact Section 622, Civil Procedure Code?

The question is an important one, and if Section 622, Civil Procedure Code, is not to be considered re-enacted the right of revision under the Guardian and Wards Act and other special Acts is lost.

Section 8 of the General Clauses Act, X of 1897, provides that where an Act “repeals and re-enacts with or without modification any provision of a former enactment then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.”

Section 6, Act XXV of 1899, substituted a new section for Section 70 of Act XVIII of 1884, this last section was a section modifying Section 622, Civil Procedure Code, in its application to the Punjab.

It seems to me then that the effect of Section 6 was to repeal and re-enact with modifications Section 622, Civil Procedure Code, and that the reference in Section 48 of the Guardian and Wards Act must be construed as a reference to Section 6 of Act XXV of 1899.

The substituted section (Section 6, Act XXV of 1899), was really a re-enactment with modification of Section 70 of Act XVIII of 1884 and that part of Section 40 of that Act which dealt with what is known as the certificate appeal.

Whether the whole of the substituted section or only such part as is a re-enactment with modifications of Section 622, Civil Procedure Code, is to be considered as referred to in Section 48 of the Guardian and Wards Act, is a question which need not be decided on the present revision.

I hold that a revision does lie, and will now hear arguments of counsel on the merits.

(The remainder of the order is not material for the purposes of this report.—ED., P. R.)

No. 49.

Before Mr. Justice Chatterji and Mr. Justice Maude.

ATMA RAM,—(PLAINTIFF),—APPELLANT,

Versus

DEVI DYAL AND ANOTHER,—(DEFENDANTS),—

RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 758 of 1898.

Pre-emption—Claim based on vicinage where the pre-emptor parted with his own property during the pendency of the suit.

Where a pre-emptor filed a suit for pre-emption of a dwelling-house on the ground of vicinage, but before obtaining a decree divested himself by gift of the proprietary right in the house the title in which gave him the right to sue.

Held, that it would be inequitable to decree his claim, as a decree in his favour would not confer upon him the benefit for securing which the right of pre-emption exists, namely, the enjoyment of his own property without molestation from undesirable neighbours.

Sakina Bibi v. Amiran and others ⁽¹⁾ and *Ram Gopal v. Piari Lal* ⁽²⁾ referred to.

Further appeal from the decree of T. J. Kennedy, Esquire, Divisional Judge, Mooltan Division, dated 28th February 1898.

Ram Bhaj Datt, for appellant.

Ishwar Das, for respondents.

The judgment of the Court was delivered by

MAUDE, J.—In this case the plaintiff sued to pre-empt a dwelling-house on the ground that it adjoined his own house. The suit was instituted in August 1897, but during the pendency of it the plaintiff in October of the same year divested himself by gift of the proprietary right in his own house, and both the lower Courts agreed that his suit must be dismissed because subsequently to the institution of it he had parted with the property, the proprietary right in which gave him the right to sue for pre-emption. The sole point for our consideration is whether that decision is correct. The contention raised on behalf of the appellant is that, as soon as the vendor proposed to sell the house in dispute, he was bound under Section 13 of the Punjab Laws Act to give notice to the plaintiff of the price at which he was willing to sell the property, that the plaintiff thus acquired an inchoate right to purchase it even before an actual sale was effected and that the moment the sale was completed the plaintiff derived an absolute title to pre-empt the property, which title could not be invalidated by any

20th Feby. 1901.

⁽¹⁾ *I. L. R.*, X All., 472.⁽²⁾ *I. L. R.*, XXI All., 441.

subsequent treatment or disposal of his own property. In support of this contention reliance has been placed on a decision of the Allahabad High Court in the case of *Sakina Bibi v. Amiran and others* ⁽¹⁾, in which the plaintiff's share in a village out of which her claim to pre-emption arose, was sold (in execution of a decree in another suit) between the date on which her suit for pre-emption was dismissed in the first Court and that on which the High Court decided her second appeal. It was held that the High Court as a Court of Appeal had only got to see what was the decree which the Court of first instance ought to have passed, and if that Court had wrongly dismissed the claim the plaintiff could not be prejudiced by her share having been subsequently sold in execution in another suit. We are unable to see that this decision materially supports the present appellant's claim, as practically what was decided was that the duty of an Appellate Court is to determine whether or not the decree appealed against was correctly passed, without reference to events which have occurred after the decree has been passed.

On the other hand a decision of the same High Court in the case of *Ram Gopal v. Piari Lal* ⁽²⁾ deals with a question very similar to that now before us, and the decision is adverse to the view put forward on behalf of the appellant. The right of pre-emption in the words of Section 9 of the Punjab Laws Act is a right vesting in certain persons to acquire "specified immovable property" "in preference to all other persons," and the existence of the right restricts the power of an owner to sell his property to whomsoever he may please. The object of the right is to secure to persons the peaceable possession of their own property without annoyance from undesirable neighbours, and the existence of the right necessarily limits the power of an individual to dispose of his own as he wills, and prevents him from showing a preference to any one to whom he may wish to sell.

The acceptance of the contention of the appellant in the present case would involve an interference with the power of the vendor to dispose of his property as he pleased, while it would not confer upon the pre-emptor the benefit for securing which the right of pre-emption exists. In the absence of any definite rule of law requiring the Courts to admit the justice of the appellant's claim, we hold that it would be quite inequitable to decree it. The appeal is dismissed with costs.

Appeal dismissed.

⁽¹⁾ I. L. R., XXI All., 472.

⁽²⁾ I. L. R., XXI All., p. 441.

No. 50.

Before Mr. Justice Chatterji and Mr. Justice Maude.

WARYAM SINGH,—(PLAINTIFF),—APPELLANT,

Versus

MUSSAMMAT PREMON,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 15 of 1899.

Marriage—Suit for a declaration that the defendant is not the lawful wife of the plaintiff—Jurisdiction of Civil Courts to entertain such a suit when an order for maintenance passed under Section 488 of the Criminal Procedure Code is in force against the plaintiff.

Held, that a Civil Court has jurisdiction to decide whether the defendant was or was not the lawful wife of the plaintiff at the time the suit was instituted. An order for maintenance passed by a Magistrate in favour of the defendant is no bar to such suit.

Further appeal from the decree of A. E. Hurry, Esquire, Divisional Judge, Ferozepore Division, dated the 9th November 1898.

Sangam Lal, for appellant.

The judgment of the Court (so far as is material for the purposes of this report) was delivered by

MAUDE, J.—The plaintiff, Waryam Singh, sued for two reliefs, 20th Feby. 1901.
 (1) that an order for maintenance passed against him by a first class Magistrate, in favour of the defendant, Mussammat Premon, might be set aside, and (2) that the defendant be declared not to be his wedded wife. The first Court decreed the claim, the decretal order being that Mussammat Premon is not the legal wife of the plaintiff, Waryam Singh, and that she is not entitled to receive maintenance from him. On appeal the learned Divisional Judge held that the Munsif's order was to all intents and purposes an attempt to set aside a maintenance order, and that the Munsif had no power to give any such decree as would practically set aside the Magistrate's order. The appeal was therefore accepted and the plaintiff's suit dismissed *in toto*. From this decision the plaintiff has appealed. We are so far in accord with the view entertained by the Divisional Judge as to hold that a decree should not have been passed in so many words that the defendant was not entitled to receive maintenance, but we are wholly unable to accept what we understand to be, also the view of the learned Judge that a Civil Court had no jurisdiction to examine and decide the question whether the defendant was or was not the lawful wife of the plaintiff. The procedure prescribed in the Code of Criminal Procedure for the disposal of applications for maintenance is of a somewhat summary character, the evidence is recorded in the manner directed in the case of summons-cases, and no appeal lies from the orders passed by

the Magistrate. We know of no authority for the view that the finding of a Magistrate for the purposes of Section 488 of the Code of Criminal Procedure that the relation of husband and wife exists between two persons, should be treated as though it were the formal adjudication of a Court with matrimonial jurisdiction. We hold, therefore, that the Munsif had jurisdiction to decide whether the defendant was or was not the lawful wife of the plaintiff at the time when the suit was instituted, and if it be finally held that she is not his wife, no doubt a declaratory decree to the effect will enable the plaintiff, on application to the Magistrate, to avoid the consequences of the order of maintenance. We accordingly set aside the order of the Divisional Judge dismissing the plaintiff's suit.

(The remainder of the judgment is not material for the purposes of this report.—ED., P. R.)

No. 51.

Before Mr. Justice Reid.

KAKA AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

RANJIT SINGH AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Civil Appeal No. 792 of 1900.

Custom—Alienation—Alienation by father of ancestral land—Objection by sons—Lohars of Jansher, tahsil Jullundur, District Jullundur.

Held, that the plaintiffs and their fathers having actually cultivated land for a considerable period, extending over several generations, though *lohars* had become agriculturists, and even thus governed by the custom prevailing amongst agricultural tribes, which limits the alienation of ancestral agricultural land and were entitled to question the alienation by their father.

Khazan Singh and others v. Maddi and others ⁽¹⁾, *Gurmukh v. Ganga Ram* ⁽²⁾, *Uttam Singh v. Jhanāa Singh* ⁽³⁾, and *Ram Mal v. Mussarnmat Miran* ⁽⁴⁾, referred to.

Further appeal from the decree of S. Olifford, Esquire, Additional Divisional Judge, Jullundur Division, dated 20th June 1900.

Oertel, for appellants.

Madan Gopal, for respondents.

The judgment of the learned Judge was as follows :—

REID, J.—This is a suit by *lohars*, residing in a village in the Jullundur *tahsil* of the Jullundur District, for possession of agri-

⁽¹⁾ 122, P. R., 1893.

⁽²⁾ 81, P. R., 1895.

⁽³⁾ 21, P. R., 1896.

⁽⁴⁾ 30, P. R., 1896.

cultural land sold by their father, on the 27th August 1890, by 16 deeds of sale for Rs. 99-15-0 each.

On the 20th March 1891 the vendor executed a sale deed of the same land, to his son-in-law Buta for Rs. 2,000, and on the 30th March the 16 prior vendees applied for compulsory registration, which was effected on the 28th April 1891, the vendor admitting execution, but alleging that he had received only Rs. 458 in respect of the 16 deeds.

On the 21st August 1891 the plaintiff-appellants instituted a suit against one of the prior vendees for a declaration that the sale to him did not affect their interest in the share, purchased by him, of the land in suit, and obtained a decree, subject to payment of Rs. 28-10-0, the proportionate share of Rs. 458, which was found to have been paid in respect of the 16 deeds.

About a year after the death of the vendor the present suit was instituted.

The Courts below have concurred in holding that the items of Rs. 748, alleged by the vendee-respondents to have been paid to one Data Ram or Mal, Rs. 100 for ornaments, and Rs. 60 alleged to have been paid to one Rai Singh, are fictitious, and I see no reason to differ from this finding. The circumstances connected with the alleged debt to Data Ram are most suspicious, and the evidence of the payment of these three items is contradictory and unsatisfactory.

Had the respondents come into Court with the explanation of the transaction suggested by the learned Divisional Judge they would have been in a stronger position.

Rs. 300 were apparently required by the vendor for a marriage, but the respondents set up three specific items which they have failed to prove, and these items, with the Rs. 458, found to have been paid, aggregate Rs. 1,366, leaving only Rs. 234 for the marriage, for which no payment is proved to have been made, and expenses of execution.

The utmost that can be allowed is the Rs. 458 allowed by the Court of first instance, in the absence of evidence that the sum required for the marriage was paid by the vendees.

Both Courts have concurred in holding that the appellants were entitled to question the alienation by their father, on the ground that, though *lohars*, they have become agriculturists and are governed by the customs prevailing amongst agricultural tribe and not by Muhammadan law.

On the evidence on the record I hold that the appellants and their ancestors have actually cultivated the land in suit, and that the land has been in the family for a considerable period, extending over several generations.

In the Settlement Records of 1880-86 they were recorded as cultivating their own land, and the evidence that they had become agriculturists is of sufficient weight to shift the burden of proof on to the respondents, who adduced no evidence.

Counsel for the respondents cites *Khazan Singh and others v. Maddi and others* ⁽¹⁾, *Gurmukh and another v. Ganga Ram and another* ⁽²⁾, and an unpublished ruling of a Division Bench of this Court, Civil Appeal No. 1499 of 1897, all of which are distinguishable from the present suit. In *Khazan Singh v. Maddi* ⁽¹⁾ the plaintiffs were first consins of the vendor, the parties being Bedis of *tahsil* Garhshankar, Hoshiarpur. It was found that the founder of the family, great-grandfather of the parties, came from Dera Nanak, a stronghold of Bedis as a sacerdotal class, and came only as a jagirdar.

In *Gurmukh v. Ganga Ram* ⁽²⁾ the plaintiffs and the alienor were cousins, and were Brahmins of *tahsil* Moga, Ferozepore, who were not proved to be agriculturists.

In the 1897 case issues were remanded on the 30th March 1900, and the appeal has not been finally decided, according to counsel for the respondents. The Court found that it had not been shown whether the parties, Rawals of *tahsil* Nurpur, Kangra, or their ancestors, themselves engaged in the pursuit of agriculture.

Counsel for the appellants cites *Uttam Singh and others v. Jhanda Singh and others* ⁽³⁾ in which the parties were Bedis of the Hoshiarpur District, and *Ram Mal and others v. Mussammat Miran and others* ⁽⁴⁾, in which the parties were *telis* of the Lahore District, and in the last Jullundur Settlement Report, 2,389 acres of cultivated land are recorded as owned by *lohars* in the district.

On the authorities and the evidence I concur with the Courts below in holding that the appellants and their father were agriculturists, governed by the custom which limits the alienation of ancestral agricultural land.

I decree the appeal and restore the decree of the Court of first instance, setting aside the decree of the lower Appellate Court.

The respondents will pay the costs of the appellants in the Lower Appellate Court and in this Court.

Appeal allowed.

⁽¹⁾ 122, P. R., 1893.

⁽²⁾ 81, P. R., 1895.

⁽³⁾ 21, P. R., 1896.

⁽⁴⁾ 30, P. R., 1896.

No. 52.

Before Mr. Justice Chatterji and Mr. Justice Maude.

ALAM AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

AKBAR ALI,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE

Civil Appeal No. 1199 of 1898.

Custom—Agriculturists—Succession to the estate of a female inherited from her father.

In a suit for succession of land left by a female who had inherited it from her father, and who first married her cousin and by him had a son, and who after her first husband's death married another man by whom she had three sons.

Held, that the son of the first marriage could not exclude the sons of the second marriage on the ground that he was the collateral of the original owner.

The collaterals of a deceased person who has been succeeded by a female as his heiress have no *locus standi* with regard to his property so long as the female's male lineal descendants are in existence.

Further Appeal from the decree of G. L. Smith, Esquire, Divisional Judge, Rawalpindi Division, dated 4th August 1898.

Muhammad Shaffi, for appellants.

Daulat Ram, for respondent.

The judgment of the Court was delivered by

MAUDE, J.—Fazal and Shamas were brothers, the former having no sons, but a daughter Mussammat Nadiran, and the other brother having two sons, Hayat and Karam-ullah. Hayat had one son, Akbar Ali, the defendant in the present case, and Karam-ullah had a son Sharaf. Mussammat Nadiran's first husband was her cousin Hayat, Akbar Ali being their son. Her second husband was Kasam, and their sons are the plaintiffs. The land in suit is the land which Mussammat Nadiran inherited from her father Fazal, and the plaintiffs' claim is that they, being three in number, are entitled to three-fourths of the land inherited by their mother from their grandfather Fazal, while the defendant's contention is that he is entitled to the whole, as he alone of the sons of Mussammat Nadiran is a collateral of Fazal, through his father Hayat. The first Court decreed the claim, but the Divisional Judge on appeal accepted the view put forward by the defendant, and dismissed the suit.

22nd Feby. 1901.

We are of opinion that the order of the first Court was correct. Whether the male collateral relatives of Fazal could have

successfully contested Mussammat Nadiran's succession to her father's property immediately on his death, we are not concerned to decide, but they did not then attempt to contest it. In 1872 Akbar Ali and his cousin Sharaf brought a suit to eject Mussammat Nadiran from the land, but were unsuccessful in attaining that object. The Tahsildar, however, went out of his way to give a decree which was not asked for and which he could not lawfully give, namely that Mussammat Nadiran had no power to alienate the property from her deceased husband Hayat's heirs. As she had made no attempt to alienate it, the plaintiffs in that suit had no *locus standi* for asking for such a decree, nor did they do so. That litigation clearly cannot preclude the plaintiffs from now claiming to succeed to a share in their mother's property.

As to their right to obtain the shares sued for we entertain no doubt. In what precise manner their mother came to succeed to her father's land does not appear, but that she did succeed is indisputable, and where a person (male or female) out of the ordinary line of succession has been allowed to succeed to immovable property, he or she passes on the property to the heirs in the male line. (Cf. *Lehna and others v. Mussammat Thakri and another* ⁽¹⁾, *Kabir Bakhsh and another v. Nabi Bakhsh and another* ⁽²⁾, *Sita Ram v. Raja Ram* ⁽³⁾, and *Rattigan's Customary Law*, para. 27, Remark 2). There can be no question of the collaterals of Fazal claiming to appropriate the land once owned by him, so long as his daughter's male lineal descendants are in existence. This is the principle acknowledged generally among the agricultural tribes of the Punjab, and counsel for the respondents has been unable to adduce any reasons why it should not be acknowledged in the present case. We accordingly accept the appeal, and, reversing the order of the Divisional Judge, decree the plaintiffs' claim with costs throughout.

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Appeal allowed.

(1) 32 P. R., 1895. (2) 40 P. R., 1896.

(3) 12 P. R., 1892.

Full Bench.**No. 53.**

*Before Mr. Justice Clark, Chief Judge, Mr. Justice Reid and
Mr. Justice Chatterji.*

BAHADAR SINGH,—(DEFENDANT),—PETITIONER,

Versus

DESRAJ,—(PLAINTIFF),

PARMANAND,—(DEFENDANT),

} —RESPONDENTS.

} REVISION SIDE.

Civil Revision No. 1123 of 1900.

Hindu Law—Mitakshara—Joint Hindu family—Alienation of ancestral property—Suit by son against his father and a mortgagee for declaration that the mortgage entered into by his father should not affect his rights—Present payment—Legal necessity—Liability of son for father's debts.

In a suit filed by a son for a declaration that a mortgage of ancestral property executed by his father for an advance which was made at the time of the mortgage and which was not for any family necessity should not affect his rights.

Held, that the mortgage not being for an antecedent debt was not binding on the son, who was entitled to a decree that the mortgage *qua* mortgage should not affect his rights, but that the decree would not bar the mortgagee from enforcing any decree which he might obtain against the father for the amount of the loan against the ancestral property, including the property mortgaged.

Semle.—A money decree obtained against a father can be realised against both the father's and son's shares of any ancestral property which may be attached as the pious obligation of a son to pay his father's debts arises in such a case.

Charanjit Singh v. Telu Mal ⁽¹⁾, *Surja Prasad v. Gulab Chand* ⁽²⁾, *Samu Ayyangar v. Ponnai Mal* ⁽³⁾, *Kishen Lal v. Garuruddhwaja Prasad Singh* ⁽⁴⁾, *Badri Prasad v. Madan Lal* ⁽⁵⁾, *Khalil-ul-Rahman v. Gobind Pershad* ⁽⁶⁾, and *Ganga Prasad v. Ajudhia Pershad Singh*, ⁽⁷⁾ followed. *Amar Singh v. Aziz Din* ⁽⁸⁾, and *Jaggan Nath v. Tulsi Das* ⁽⁹⁾ referred to.

Petition for revision of the decree of Maulvi Inam Ali, Divisional Judge, Sialkot Division, dated 29th June 1900.

Dhanraj Shah, for petitioner.

Shadi Lal, for respondents.

The point of law involved was referred to a Full Bench by the following order of the learned Chief Judge in Chamber—

CLARK, C. J.—On 28th April 1894 Parmanand mortgaged a 14th Dec. 1900.
house and half shop to Bahadar Singh for Rs. 300. Plaintiff, minor

⁽¹⁾ 152 P. R. 1888.

⁽²⁾ I. L. R., XXVII Calc., 762.

⁽³⁾ I. L. R., XXI Mad., 28.

⁽⁴⁾ I. L. R., XXI All., 238.

⁽⁵⁾ I. L. R., XV All., 75.

⁽⁶⁾ I. L. R. XX Calc., 328.

⁽⁷⁾ I. L. R., VIII Calc., 131.

⁽⁸⁾ 33 P. R., 1892.

⁽⁹⁾ 72 P. R., 1892.

son of Parmanand, sues for a decree declaring that the mortgage shall not affect his rights.

The mortgaged property is ancestral, Rs. 300 was taken at the time of the mortgage.

I hold that there is no proof that the money was taken for an immoral purpose, and also that it is not proved that the money was taken for necessity.

The question then is whether plaintiff is bound by the mortgage.

Charanjit Singh v. Telu Mal and another ⁽¹⁾ is in favour of plaintiff, but doubt is thrown upon the judgment by *Jagan Nath v. Tulsi Das* ⁽²⁾, and *Amar Singh v. Aziz-ud-Din* ⁽³⁾.

I refer the case to a Full Bench for decision of the question whether under the circumstances stated above plaintiff can claim a declaratory decree that the mortgage by his father shall not affect his rights.

The judgments delivered by the learned Judges who constituted the Full Bench were as follows:—

22nd Feby. 1901.

CLARK, C. J.—The question referred may be restated as follows :

When a father has mortgaged ancestral property for a present advance of money—there being no proof, on the one hand, that the money was taken for immoral purposes, or on the other hand, that it was taken for necessity—is the son entitled to a decree that the mortgage shall not affect his rights ?

In *Charanjit Singh v. Telu Mal* ⁽¹⁾ Sir W. Rattigan held that “a Hindu father has, under the Mitakshra Law, no absolute power of disposition over ancestral immoveables, except for the purpose of meeting some urgent family necessity, the person who takes a mortgage of such property from the father, in consideration merely of a present advance, is bound to establish, in a suit brought by a son to challenge the validity of the alienation so far as it affects his interests, that the advance was made by him after a reasonable and fair enquiry which satisfied him, as a prudent man, that the money was required for the legal necessities of the family, in respect of which the father, as head and managing member, could deal with and bind the ancestral estate.”

Amar Singh v. Aziz-ud-din ⁽³⁾ referred to a different matter, namely the liability of ancestral property in execution of decrees

⁽¹⁾ 152 P. R., 1888. ⁽²⁾ 72 P. R., 1898.

⁽³⁾ 33 P. R., 1892.

obtained against the father alone, the son not being a party to the suit.

Mr. Justice Rivaz there says "the decree was undoubtedly obtained for an antecedent debt, and any sale which followed in execution would be of the nature of an involuntary alienation for a debt of that character. The above view renders it unnecessary to consider whether the broad distinction drawn in *Charanjit Singh v. Telu Mal* ⁽¹⁾ between alienations in consideration of a present loan, and those for the payment of antecedent debts, can be supported in view of the more recent explications of the law by the Judicial Committee."

Jagan Nath v. Tulsi Das ⁽²⁾ was similar to *Amar Singh v. Aziz-ud-din* ⁽³⁾: the son was there objecting to the attachment of property attached in execution of a decree obtained against the father, and it was held that the son was setting up his right against the creditor's remedy for his debt and that he could not do that.

There are thus two distinct questions—

- (1) Whether alienation made by a father for a present advance without any family necessity is binding on the son?
- (2) When a money decree has been obtained against the father and ancestral property attached, whether the son's rights in that property can be sold.

My view is that in the former case the alienation is not binding on the son, and in the latter case the son's rights are liable to be sold.

In the former case the pious obligation of the son to pay his father's debts does not arise, while it does arise in the latter case.

The practical result to the son is often the same in both cases, for though the mortgagee cannot proceed against the son's estate on the strength of the mortgage, he can obtain a decree against the father and then proceed against the son's estate.

Surja Prosad and another v. Golab Chand ⁽⁴⁾ is an illustration where the result was different. The mortgage was held not to be binding on the son, but it was held that the mortgagee would be entitled to a money decree against the son not upon the mortgage security, but upon the simple obligation created by the bond, which was barred by limitation.

⁽¹⁾ 152 P. R., 1888.

⁽³⁾ 33 P. R., 1892.

⁽²⁾ 72 P. R., 1898.

⁽⁴⁾ I. L. R., XXVII Cal., 762.

Sami Ayyangar v. Ponnai Mal ⁽¹⁾ contrasts clearly the position of the son in the two cases. It was held that "in order to justify a sale or a mortgage by a father so as to bind his son's share of the property there must be in fact an antecedent debt, *i.e.*, a debt prior to the mortgage or sale, and that the mortgage was not binding on the son in respect of his share, but that this would not affect the right of the plaintiff to proceed against the son's share in execution of the decree, treating it as a mere money decree."

Kishan Lal v. Garuruddhwaja Prasad Singh ⁽²⁾ rules that "it is now settled law in this Court since the case of *Badri Prasad v. Madan Lal* ⁽³⁾ that a son can be sued jointly with his father to recover a debt contracted by the father if the debt had not been contracted for purposes sued as would exonerate the son from the pious duty of paying his father's debt."

In *Khalil-ul-Rahman v. Gobind Pershad* ⁽⁴⁾ the rights of the son are discussed at length, and it was held that in the case of a Mitakshra family consisting of a father and minor sons, where the father hypothecates ancestral property, there being no proved necessity, but, on the other hand, no proof of immoral or illegal purposes, and no proof that the lender made any enquiry as to the purpose, the debt itself is an antecedent debt within the rulings of the Privy Council, and the mortgagee is entitled in a suit against the father and sons to a decree directing the debt to be raised out of the whole ancestral estate, inclusive of the mortgaged property.

In this case the Full Bench decision in *Ganga Prasad v. Ajudhia Pershad Singh* ⁽⁵⁾ is referred to, where in the case of a mortgage made for present advance without necessity it was held: "The mortgage itself upon which the money was raised could not be enforced, but the debt so contracted by the father being itself an antecedent debt within the rulings of the Privy Council, and the son being a party to the suit, the mortgagee, notwithstanding the form of the proceedings, would be entitled to a decree directing the debt to be raised out of the whole ancestral estate inclusive of the mortgaged property."

On page 403 of Mayno's *Hindu Law*, 6th edition, is given a suggested summary of the decision on the subject of liability of a son for his father's debts.

I. "That in cases governed by Mitakshra law a father may sell or mortgage not only his own share but his son's shares, in

⁽¹⁾ *I. L. R.*, XXI *Mad.*, 28.

⁽²⁾ *I. L. R.*, XV *All.*, 75.

⁽³⁾ *I. L. R.*, XXI *All.*, 238.

⁽⁴⁾ *I. L. R.*, XX *Cal.*, 328.

⁽⁵⁾ *I. L. R.*, VIII *Cal.*, 131.

“family property, in order to satisfy an antecedent debt of his own, not being of an illegal or immoral character, and that such a transaction may be enforced against his sons by a suit and by proceedings in execution to which they are no parties.”

III. “That a creditor may enforce payment of the personal debt of a father, not being illegal or immoral, by seizure and sale of the entire interest of father and sons in the family property, and that it is not absolutely necessary that the sons should be a party either to the suit itself or to the proceedings in execution.”

On page 426 it is stated : “It is, therefore, an established rule that a father can make no disposition of the joint property which will prejudice his issue, unless he obtains their assent, if they are able to give it, or unless there is some established necessity, or moral, or religious obligation to justify the transaction.”

I would, therefore, answer the reference by saying that in the circumstances stated the mortgage *qua* mortgage is not binding on plaintiff, and that he is entitled to a declaratory decree that the mortgage *qua* mortgage shall not affect his rights, but that this decree is without prejudice to the rights of the mortgagee to enforce a decree against the father against the whole ancestral estate inclusive of the mortgaged property.

REID, J.—I concur both in reasons recorded and in the answer to the reference. 23rd Feby. 1901.

CHATTERJI, J.—I concur. The mortgagee is not here seeking to recover his debt, or to enforce the mortgage against the share of the son, but it is the son who is suing for a declaration that the mortgage as an alienation of joint property is not binding on his interests. He is entitled to this declaration as the mortgage was not effected in consideration of an antecedent debt or for a family necessity. Had the mortgagee been suing for his money he would have been entitled to a decree like that given in *Khalil-ul-Rahman v. Gobind Pershad* (1), and the present decree will not affect his remedies for the realization of his debt. 23rd Feby. 1901.

(1) I. L. R., XX Calc., 328.

Full Bench.**No. 54.**

*Before Mr. Justice Chatterji, Mr. Justice Robertson and
Mr. Justice Maude.*

REVISION SIDE. {

UMAR DIN AND OTHERS,—(DEFENDANTS),—PETITIONERS,

Versus

ALA BAKHSH,—(PLAINTIFF),—

AND

NUR DIN,—(DEFENDANT),—

} RESPONDENTS.

Civil Revision No. 682 of 1900.

*Revision—Second application for revision after decision of first application
—Review of order passed on revision—Civil Procedure Code, 1882, Sections
622 and 623.*

Held, that the dismissal of an application for revision in default of appearance does not bar the entertainment of a second application for revision, but where an application for revision has been entertained and an order passed after consideration of the case, a second application for revision should not be received, the proper remedy being for the applicant to ask for a review of judgment, which may be had in such a case.

*Petition for revision of the decree of S. S. Harris, Esquire,
Additional District Judge, Rawalpindi, dated 30th May 1899.*

Oertel, for petitioners.

Parker and A. K. Mahroof, for respondents.

The judgment of the learned Judges who constituted the Full Bench was delivered by

27th Feby. 1901.

MAUDE, J.—The question referred for the consideration of the Full Bench is, whether when an application for the revision of an order of a subordinate Court has been considered and decided by a Judge or Bench of this Court, a second application can be entertained for the revision either of the subordinate Court's order, or of the order previously passed by this Court. The reference has arisen out of an application which was described as a petition for the revision of an order of the Additional District Judge, Rawalpindi, dated May 30th, 1899. A previous application had been made for the revision of this same order, and had been fully considered, after notice to the respondents, and decided by a Judge in Chambers, who had in the main upheld the order passed by the subordinate Court, but had modified it in two particulars.

On the analogy of several rulings of this Court which are generally to the effect that the subsisting decree in a suit is that pronounced by the Appellate Court of ultimate jurisdiction, even

though the appeal to it be rejected without notice to the respondents, it was argued for the respondents that when an application for revision under Section 622 of the Code of Civil Procedure has been entertained and disposed of by this Court, the order of this Court, whether rejecting the application or interfering with the Subordinate Court's order, is itself the only subsisting order, and that therefore a second application, though nominally made for the revision of an order passed by a subordinate Court, is in reality an application for the revision of an order of this Court. And as regards this point it was urged that Section 622 of the Code does not apply to a case where the order of which revision is sought is one passed by a High Court. This is the view on the latter point which has been taken by the Bombay High Court in *re Premji Thrikum Das* ⁽¹⁾. With regard to the practice of this Court our attention was invited to the following cases: *Court of Wards v. Fatteh Singh* ⁽²⁾, *Ram Singh v. Dewa Singh* ⁽³⁾ and *Kahn Ohnd v. Mussanmat Indur Kour* ⁽⁴⁾. The first mentioned case is really not in point because there an application had been made to set aside an order, passed in default of appearance, rejecting a petition for revision, and the Judges held without discussing the matter, that the proper course was for the petitioner to submit a second application for the revision of the order of the subordinate Court. From that opinion we see no reason to dissent, because the rejection of a petition for revision in default of appearance means no more than that the case is not considered, and there is no refusal on the merits to exercise jurisdiction under Section 622 of the Code. The second case, however, stands on a different footing. There, a petition for the revision of an order passed in appeal by a subordinate Court had been duly considered by a Judge of this Court, who had recorded his reasons for declining to interfere. An application was subsequently made for a review of the order of the learned Judge, who, however, was of opinion that the Court's refusal to exercise its powers of revision under Section 622 is not a decree or order such as is contemplated by Section 623 of the Code, and that therefore there could be no review of the order passed; but the application might be regarded as a fresh application under Section 622, provided the full Court fee were paid. This opinion was communicated to two other Judges of the Court, who concurred in it, though no reasons were recorded, nor was the question decided by them at any stage of a judicial proceeding. This view was adopted in the third case referred to above in so far that a second application for revision of the

⁽¹⁾ *I. L. R.*, XVII Bom., 514. ⁽²⁾ Unpublished Civil Revision 777 of 1885.

⁽²⁾ 75 P. R., 1881. ⁽⁴⁾ 23 P. R., 1898.

order of a Small Cause Court was admitted,' although the first one had been rejected after notice to the respondents. After a full consideration of the question we are unable to share the view expressed in 1885, and we are of opinion that when an application for revision has been entertained and an order passed after consideration of the case, and after hearing the petitioner or his counsel, a second application for revision should not be received, and it appears to us to be immaterial whether the result of the first application has been its rejection, or the modification or reversal of the order of the subordinate Court. It is unnecessary for us to decide the point raised by the learned advocate for the respondents as to whether the decree or order of a subordinate Court is necessarily merged in the order passed by this Court under Section 622 of the Code, but we agree with him so far as to hold that the rejections of an application after hearing the petitioner or his counsel, and after consideration of the case, implies that a Judge or Bench of this Court, as the case may be, has considered that the order of which revision was sought was correct, or at least that the provision of Section 622 afforded no grounds for interference. A second application for revision of the order of a subordinate Court is tantamount, therefore, to a request that the provisions of Section 622 may be applied to correct an error in an order passed by this Court, and we agree with the ruling of the Bombay High Court that those provisions are not intended to apply to orders passed by a High Court.

The question whether a review of judgment can be had in the case of an order passed on an application for revision was not specifically referred for the consideration of the Full Bench, but as it is intimately connected with the reference, and has been argued before us, we think it advisable to come to a decision in the matter. We have no doubt that an application for review of judgment may be entertained where the Court has exercised jurisdiction under Section 622 of the Code of Civil Procedure, for in such a case the order passed by the Court is clearly "the formal expression" of its decision, within the meaning of Section 2 of the Code, even if the order does not amount to a decree, *Muhammad Yusuf Khan v. Abdul Rahman Khan* ⁽¹⁾. The only doubt can arise where the Court declines to call for the record of a case, that is refuses to apply the provisions of Section 622; but after careful consideration we see no sufficient reason why such a refusal should be held not to be an "order" within the meaning of Section 623, clause (b), of the Code. The order is a formal expression of the Court's decision not to call for the records, and consequently not to interfere

(1) *L. R.*, 16 *I.*, 4, 104.

with the decision of the subordinate Court, and we are unable to see why the order does not come within the purview of Section 623. To sum up, then, we hold that the dismissal of an application for revision in default of appearance need not bar the entertainment of a second application, but that in other cases a second application should not be received, and that a review of judgment may be had in the case of an order passed on an application for revision.

The petitioner can now proceed with his application for review, which we hold need not be considered to have been finally disposed of by the Judge in Chambers, but to have been converted into one for Revision.

No. 55.

Before Mr. Justice Reid.

EDULJI AND Co.,—(PLAINTIFFS),—PETITIONERS,

Versus

MCDONALD,—(DEFENDANT),—RESPONDENT.

REVISION SIDE.

Civil Revision No. 1436 of 1900.

Interest—Implied agreement to pay interest—Interest Act, XXXII of 1839—No objection to notice on contract—Promise to pay—Discretion of Court—Revision.

Held, that the fact that a customer signed order forms and received bills headed with the printed words "Terms one month's credit, interest at 12 per cent. charged on expiry" was not sufficient evidence of a promise to pay interest.

Held also, that, as it is within the discretion of a Court to allow interest under the provisions of the Interest Act, XXXII of 1839, the Chief Court will not interfere on revision with the order of a Court disallowing interest, except where there has been an abuse of the discretion.

Rukun Din v. Rikhi Kesh ⁽¹⁾, and *Kuppasami Pillai v. Madras Electric Tramway Company* ⁽²⁾ referred to. *Gordon v. Swan* ⁽³⁾, *Harrison v. Allen* ⁽¹⁾, and *re Lloyd Edwards* ⁽⁵⁾ followed.

Petition for revision of the decree of Captain W. F. C. Taylor, Judge, Small Cause Court, Peshawar, dated 17th August 1900.

Beechey, for petitioner.

The facts sufficiently appear from the judgment of the learned Judge.

REID, J.—This is an application, under Section 25 of Act 28th Feb'y. 1901. IX of 1887, for revision of a decree of a Court of Small Causes

⁽¹⁾ 36 P. R., 1894.

⁽³⁾ 12 East, 419.

⁽²⁾ I. L. R., XXIII Mad., 41.

⁽¹⁾ 2 Bing, 4.

⁽⁵⁾ 61 L. J. Ch., 22.

refusing interest on an account for goods supplied. Interest is claimed on two grounds:—

(1). Because the ordinary course of business between the parties, proved by the signature of the debtor to vouchers or order forms, headed with the printed words "Terms one month's credit, interest at 12 per cent. charged on expiry," raises the inference that an agreement for payment of interest existed between the parties.

(2). Because notice of intention to charge interest was given in writing by the creditor to the debtor.

The Judge of the Court below has found that vouchers and bills were headed as above stated, and that notice of the intention to charge interest was given in writing, but has dismissed the claim for interest on the grounds that such notice is customary, and is customarily disregarded, and that it is not customary to award interest on unpaid bills.

The suit was instituted within six months of an account being rendered and within three months of notice of intention to charge interest. There was not, therefore, excessive delay in payment.

Counsel for the petitioner cites *Rukun Din v. Rikhi Kesh* ⁽¹⁾ a belated report of a judgment delivered in 1879, and *Kuppusami Pillai v. Madras Electric Tramway Company* ⁽²⁾, and relies on Act XXXII of 1839, which was extended to the Peshawar District, in which this suit was instituted, by notification under Act XIV of 1874.

The Madras case cited was an original suit, decided under Act XXXII of 1839, which runs as follows: "the Court . . .

. . . may, if it shall think fit, allow interest to the creditor," while . . . the corresponding English Act 3 and 4 Will, IV C., 42, runs as follows "the jury . . . may, if they shall think fit, allow interest to the creditor."

The presiding Judge found that there had been a delay of several years in payment, and allowed interest on the amount due. In considering the fitness of allowing interest, Courts in this country exercise the functions of jurors, and discretion is vested in Courts which should not be interfered with in revision by this Court except in cases in which there has been an abuse of the discretion.

In the present case the Court below has not abused the discretion vested in it, and I decline to interfere under Act XXXII

⁽¹⁾ 36 P. R., 1894.

⁽²⁾ I. L. R., XXIII Mad., 41.

of 1839. On the question whether a contract should be inferred from the dealings between the parties, the present case is by no means on all fours with *Rukun Din v. Rikhi Kesh* ⁽¹⁾, in which Plowden, J., said: "I concur with the Commissioner in holding that an agreement, that the balance of *Sambat* 1933 shall bear interest at Re. 1-8-0 per cent. is to be inferred from the course of dealing between the parties. The parties are banker and customer, and they made up their loan accounts yearly, from *Sambat* 1928 to *Sambat* 1933. In *Sambat* 1928 and 1929 the defendant expressly agreed to pay interest at Re. 1-8-0 per cent. In the later years, no reference was made to interest in the written acknowledgment of the balance due, but, in making up the yearly account from *Sambat* 1898 onwards, interest was always calculated at Re. 1-8-0 per cent. on the last balance, and the new balance was accepted by the defendant. Under these circumstances I have no difficulty in concluding that there was a contract that the defendant would pay the balance of *Sambat* 1933, with interest thereon at the rate of Re. 1-8-0 per cent."

Now the facts relied on in the present case, as raising an inference that the debtor contracted to pay interest, are that, when ordering goods, he signed orders on forms headed as above stated, and that the account rendered was similarly headed. It has not been contended that interest was ever paid by the debtors. In *Leake on Contracts*, Edition 3, *Gordon v. Swan* ⁽²⁾ and *Harrison v. Allen* ⁽³⁾, are cited as authority for the rule that interest is not generally allowed upon the unpaid price of goods sold and delivered, though, by the contract of sale, a fixed period of credit is given; and *Re Lloyd Edwards* ⁽⁴⁾ is cited as authority for the rule that an account delivered for goods supplied, with a charge for interest, though not objected to and money paid on account, is not sufficient to support a claim for interest by agreement or under the statute of 3 and 4 Will. IV, and that an account for goods, with the heading "Five per cent. interest charged after twelve months' credit," is not a sufficient demand of interest upon the items of the account within the statute.

The fact that the debtor signed order forms with the heading above stated does not, in my opinion, carry the case further than the facts stated in the English authorities above cited, and does not raise an inference that the debtor contracted to pay interest.

I dismiss the application, but without costs, the respondent being unrepresented.

Application dismissed.

⁽¹⁾ 36 P. R., 1894.

⁽²⁾ 12 East, 419.

⁽³⁾ 2 Bing., 4.

⁽⁴⁾ 61 L. J. Ch., 22.

No. 56.

Before Mr. Justice Reid.

POHLU SHAH,—(PLAINTIFF),—PETITIONER,

Versus

DITTA SINGH,—(DEFENDANT),—RESPONDENT.

Civil Revision No. 929 of 1900.

Parties—Adding parties as plaintiffs—Joint promise to plaintiff and others—Right of plaintiff to sue alone—Cause of action—Non-joiner—Procedure—Civil Procedure Code, 1882, Section 54 (c).

Held, that, on objection taken by the defendant on the ground of non-joinder of a party as plaintiff, at the first hearing, the plaint may be rejected under Section 54 (c) without being returned for amendment, if the plaintiff insists on adhering to the allegation that the contract sued on was entered into with him alone; and that the appellate Court may dismiss his appeal against the order of rejection without giving him an opportunity to amend his plaint by adding the party who should originally have been added.

Ramsebuk v. Ram Lal Koondoo ⁽¹⁾ and *Badri Das v. Jawala Pershad* ⁽²⁾ followed. *Kale Khan v. Sewa Ram* ⁽³⁾ referred.

Petition for revision of the decree of Munshi Ejaz Nabi, District Judge, Gurdaspur, dated 31st March 1900.

Ishwar Das, for petitioner.

Ram Bhaj Datta, for respondent.

The following judgment was delivered by the learned Judge:—

15th March 1901.

REID, J.—The petitioner instituted a suit against the respondent, who pleaded that the petitioner's partner, Lachman Das, should join as a plaintiff.

The Court of first instance found, after strenuous opposition by the petitioner, that Lachman Das was the petitioner's partner, and that the suit could not proceed at the instance of the petitioner alone.

The plaint was therefore rejected under Section 54 (c) of the Code of Civil Procedure, neither the petitioner nor Lachman Das having applied for the addition of the latter as co-plaintiff or as co-defendant.

The order of rejection was appealed, and the appellate Court concurred in finding that the partnership existed, and dismissed the appeal.

The memorandum of appeal included a plea that even if Lachman Das were held to be a partner the suit could not be

⁽¹⁾ *I. L. R.*, VI Calcutta, 815. ⁽²⁾ 86 P. R., 1891 (F. B.).

⁽³⁾ 156 P. R., 1889 (F. B.).

dismissed, as neither the plaintiff nor Lachman Das had ever refused to allow the latter to be added as a co-plaintiff. In *Ram-sebuk v. Ram Lal Koondoo* ⁽¹⁾, Garth, C. J., remarked at pages 821-22: "In actions of contract it is the right of the defendant, if he takes the objection in proper time, to insist upon all the persons with whom he contracted being joined as plaintiffs, and if, after the objection has been raised, the plaintiff proceeds with the suit without taking steps to add the person or persons whose non-joinder has been objected to and the Court finds that the objection is well founded, the suit must be dismissed. It is for this reason that the non-joinder of plaintiffs in an action of contract has always been a plea in bar."

In *Kale Khan v. Sewa Ram* ⁽²⁾, relied on for the petitioner, at page 535, Plowden, S. J., remarked: "If there is no positive rule of Indian law that all persons, who are entitled to sue for compensation for breach of a promise made to them jointly, must join as plaintiffs in a suit brought with that object, and I think there is no such rule, it seems to me clear that an objection, whether taken before or after judgment, that any such person has not joined as plaintiff, is in substance nothing more or less than an objection for want of parties and, if not taken in due time, must be deemed to have been waived under Section 34."

The same learned Judge in *Badri Das v. Jawala Pershad and others* ⁽³⁾ remarked: "I only desire to add that this suit is clearly distinguishable from *Kale Khan v. Sewa Ram* ⁽²⁾. In that case there was an allegation in the plaint of a promise to the plaintiff and others who were not joined as parties."

"Here the plaintiff sued on a promise to himself alone, and the defendants denied the promise alleged by plaintiff, alleging that the promise was one to plaintiff and two others jointly. The plaintiff denied this allegation, and adhered to the claim as stated in the plaint. The proper order seems to me to be to dismiss the appeal, and thus confirm the order dismissing the suit, without going into the question whether the precise grounds on which the lower (appellate) Court refused to permit amendment of the plaint are correct, or whether he can be permitted to amend his plaint."

The rule which I deduce from these authorities is that, on objection taken by the defendant, on the ground of non-joinder of a party as plaintiff, at the first hearing, the plaint may be rejected under Section 54 (c) without being returned for amend-

⁽¹⁾ *I. L. R.*, VI *Calcutta*, 815. ⁽²⁾ 156 *P. R.*, 1889 (F. B.).

⁽³⁾ 86 *P. R.*, 1891 (F. B.).

ment, if the plaintiff insists on adhering to the allegation that the contract sued on was entered into with him alone, and that the appellate Court may dismiss his appeal against the order of rejection, without giving him an opportunity to amend his plaint by adding the party who should originally have been added. I dismiss the application with costs, Pleader's fee Rs. 25.

Application dismissed.

No. 57.

Before Mr. Justice Reid.

SAMAND KHAN,—(PLAINTIFF),—PETITIONER,

Versus

PIR BAKHSH,—(DEFENDANT),—RESPONDENT

Civil Revision No. 1084 of 1900.

Civil Procedure Code, 1882, Section 203—Judgment of Small Cause Court— Small Cause Court Act, 1887, Section 25.

Held, that a judgment of a Small Cause Court should convey some indication that the Judge applied his mind to weighing the evidence on the record or of the conclusion arrived at by him, and that the mere words "issue not proved and claim be dismissed" are obviously inadequate under Section 203 of the Civil Procedure Code.

Malik Rahmat v. Shiva Prasad ⁽¹⁾, *Bai Jasoda v. Bamansha Mancherji* ⁽²⁾, and *Sarup Chand v. The Bombay, Baroda and Central India Company* ⁽³⁾, followed *Petition for revision of the decree of Lala Gauri Shanker, Munsif, 1st Class, and Judge, Small Cause Court, Jullundur, dated 23rd March 1900.*

Golak Nath, for petitioner.

The following judgment was delivered by the learned Judge:—

19th March 1901. REID, J.—The petitioner instituted a suit for the restoration of jewelry pawned or its value.

He put into the witness box 8 witnesses; 2 to the deposit; 2 to demand and promise to restore; 2 to negotiations for a compromise; 1 to the manufacture of jewelry for the plaintiff; and 1 to jewelry having been pawned by the defendant.

The judgment of the Court below, a Munsif with Small Cause Court powers, is as follows:—

"The parties are present.

"The only issue framed in this case is whether, as alleged by "the plaintiff, the defendant borrowed from him the jewelry in

⁽¹⁾ *I. L. R.*, XIII *All.*, 533. ⁽²⁾ *I. L. R.*, XXIII *Bom.*, 335.

⁽³⁾ 41 *P. R.*, 1896.

"dispute and, if so, what was the value of that jewelry. As the
 "above issue is not proved it is ordered that the plaintiff's claim be
 "dismissed with costs."

Malik Rahmat v. Shiva Prasad ⁽¹⁾ and *Bai Jasoda v. Baman-sha Mancheri* ⁽²⁾ are authority for holding that, where there is nothing to excite suspicion and the plaintiff has given such proof of his claim as the law requires, the plaintiff and a High Court are entitled to have some indication from the Judge of a Court of Small Causes of the point upon which he dismisses a suit, to show that he is not acting from mere caprice or in ignorance of the rules of law which regulate the proof requisite to establish a plaintiff's claim. *Sarup Chand v. The Bombay, Baroda and Central India Company* ⁽³⁾, is also in point.

The judgment is obviously inadequate and conveys no indication that the Judge applied his mind to weighing the evidence on the record or of the conclusion arrived at by him.

I set aside the decree of the Court below and return the record in order that the suit may be disposed of in accordance with law.

Costs will abide the result.

Application allowed, cause remanded.

No. 58.

Before Mr. Justice Clark, Chief Judge.

BHAGWAN DAS AND OTHERS,—(JUDGMENT-DEBTORS),—
 APPELLANTS,

Versus

JAI RAM DAS AND OTHERS,—(DECREE-HOLDERS),—
 RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 383 of 1900.

Appeal—Appeal from insolvency order—Civil Procedure Code, 1882, Sections 588 (17) and 589.

By Panjab Government Notification No. 940, dated 24th October 1888, the Divisional Court is deemed to be the District Court per proviso (a), Section 589, Civil Procedure Code, 1882, consequently in all suits where the subject-matter is not more than Rs. 5,000, an appeal from an order under Section 351 (a) of the Code lies to the Divisional Court.

Venkatraya v. Jamboo Ayyan ⁽⁴⁾ distinguished.

*First appeal from the order of the District Judge, Hissar, dated
 26th March 1900.*

Lajpat Rai for appellants.

⁽¹⁾ I. L. R., XIII All., 533.

⁽²⁾ I. L. R., XXIII Bom., 335.

⁽³⁾ 41, P. R., 1896.

⁽⁴⁾ I. L. R., XVII Mad., 377.

The judgment of the learned Chief Judge was as follows:—

30th Jan'y. 1901.

CLARK, C. J.—Jai Ram Das Lachmi Narain had a decree for Rs. 1,304 against Bhagwan Das, and had him arrested. Upon this Bhagwan Das applied under Section 344, Civil Procedure Code, for declaration of insolvency. The District Judge has rejected the application under Section 351 (a), Civil Procedure Code.

Bhagwan Das has appealed to this Court, and the first question is whether the appeal lies to the Court. Appeal is given by Section 588 (17), Civil Procedure Code, and the course of appeal determined by Section 589, Civil Procedure Code. By Punjab Government Notification No. 940, dated 24th October 1888 (*vide* page 88, Vol. I, Chief Court Circulars) the Divisional Court is deemed to be the District Court for proviso (a), Section 589, Civil Procedure Code.

This appeal therefore lies to the Divisional Court.

Venkatrayar v. Jamboos Ayyan (1) is not applicable, as the value of the suit in which Bhagwan Das was arrested is under Rs. 5,000.

I direct that the memo. of appeal be returned to appellant for presentation in the Court having jurisdiction.

No. 59.

Before Mr. Justice Chatterji and Mr. Justice Maudslayi.

ANIS-UL-REHMAN KHAN AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

BENI RAM AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Civil Appeal No. 1166 of 1898.

Evidence Act, 1872, Sections 35, 74, 80, 90—Public Record—Ancient documents—Presumption as to their genuineness—Production from proper custody—Mortgage—Acknowledgment of liability—Limitation Act, 1877, Section 19.

In a case where the question of age of a person at a certain time was disputed, held that the descriptive roll of that person prepared by a public officer in accordance with the law in force at that time and a Patwari's statement about an entry in the Revenue papers (both of which documents were more than 50 years old) and the Municipal Register of Deaths were relevant under Section 35 of the Evidence Act, and being public documents within the meaning of clause (iii) (1) of Section 74 of that Act and produced from proper custody, presumed to be genuine.

Held also, that an acknowledgment of a mortgagor's title by a minor is inoperative and cannot give a new starting point for limitation for redemption under Section 19 of the Limitation Act, 1877.

(1) *L. R., XVII Mad., 377.*

Gobindrav Deshmukh v. Ragho Deshmukh ⁽¹⁾, *Dharma Vithal v. Gobind Sadvalkar* ⁽²⁾, *Venkata v. Partha Saradhi* ⁽³⁾, *Jalli and others v. Mahar Pir Baksh* ⁽⁴⁾, and *Oliver v. Woodroffe* ⁽⁵⁾, referred to.

Further appeal from the decree of S. Clifford, Esquire, Divisional Judge, Delhi Division, dated 13th June 1898.

Beechey for appellants.

Madan Gopal and Rajnarain for respondents.

The facts of the case are fully stated in the judgment of the Court delivered by

CHATTERJI, J.—The material facts of this case are briefly these :— 2nd Feby. 1901.

The property in suit belonged to Nawab Nawazish Khan who mortgaged it by deed, dated 11th January 1821, to one Gopi Nath, a Khatri, for Rs. 3,000. It was a *milk nafi* at the time, consisting of agricultural land and a well. On 26th February a further document was executed by the Nawab by which he agreed to pay Rs. 360 a year as interest on the mortgage debt, and if the profits of the property fell below this sum, to make up the deficiency.

In 1836 there was an inquiry into the *milk nafi* tenure under Regulation 2 of 1819 in which Kesho Das, son of Gopi Nath, appeared through a Pleader or Mukhtar, Naunidh Rai, and claimed to be the mortgagee, and to have planted a garden on 12 *bighas* and enclosed it with a wall. The *nafi* was resumed as appears from a *robkar* of 30th June 1836. The mortgagor put in no appearance in these proceedings.

In 1842 another inquiry was set on foot about resumption, in which it was at first proposed to give Kesho Das a pension. Kesho Das in these proceedings set up proprietary rights and asserted that the land was his sole property, and that he had no co-sharers. He was examined, and his descriptive roll was prepared, from which it appears that hair was just sprouting on his lips. He stated his age to be eighteen years. Eventually it was ordered that Kesho Das should be entered as proprietor, and that the land should be settled with him at half rates.

In 1874 there was a partition in the family of Kesho Das, and this land then came to the share of Ganga Bishen, the son of Banarsi Das, a brother of Kesho Das. In the Settlement of 1880 Ganga Bishen was recorded sole proprietor.

(1) I. L. R., VIII Bom., 543.

(2) I. L. R., XVI Mad., 227.

(3) I. L. R., VIII Bom., 99.

(4) 9, P. R., 1897.

(5) 4, M. and W., 653.

On 17th December 1881 Ganga Bishen granted a *Sardarakhti* lease for ten years to *Neota*, &c. This was followed by a series of alienations which are set forth in the judgment of the Divisional Judge at page 8 of the printed paper book. The ultimate result of these transactions was that *Neota*, &c., became full owners of 47 *bighas* 10 *biswas* out of the land in suit which they mortgaged to Beni Ram, defendant, for Rs. 10,000 on 3rd November 1890 redeeming a prior mortgage to him, dated February 1885, and Rai Sheo Sahai Mal purchased the rest of the land from Ganga Bishen for Rs. 1,200 which he sold to Jaggan Nath on 7th February 1890.

The plaintiffs claiming to be heirs of Nawab Nawazish Khan, the original mortgagor, sue for redemption and possession of the land from the present owners on the deed of 11th January 1821, alleging that the mortgage debt has been paid from the usufruct, but offering to pay anything that may be found still due to the mortgagee's representatives. They deny the genuineness of the deed of 26th February 1891, and seek to bring their claim within limitation by the acknowledgments contained in a power-of-attorney by Kesho Das, dated 28th November 1836, in favour of Nannidh Rai in which he describes himself as *girwidar* or mortgagee and in a petition, dated 3rd December 1836, purporting to be filed by him through the same mukhtar in which the land is stated to have been mortgaged to his father for Rs. 3,000.

The defendants plead (1) that Nawab Nawazish Khan abandoned all his rights, (2) that they were confiscated by Government, (3) that the suit was barred by time, (4) that defendants had held adverse possession, (5) that defendants other than heirs of Gopi Nath were *bona fide* purchasers for value without notice, (6) that it was agreed that interest at Rs. 12 per cent. would be paid, (7) that there was no income and the mortgagees were not liable to account, (8) that the documents relied on as acknowledgments were not genuine or executed with authority or valid as acknowledgments, and (9) that improvements were made on the property at a cost of Rs. 40,000 which the mortgagors were in any case bound to pay.

The District Judge of Delhi framed fifteen issues which cover all the points raised before him by the pleadings. After a protracted inquiry, he decreed the plaintiffs' claim on payment of Rs. 3,000.

Both parties appealed from this decree. The Divisional Judge accepted the appeal of the defendants holding the claim to

be barred by limitation. He held the documents relied on by plaintiffs to be genuine and likewise to be good as acknowledgments, but for the fact that Kesho Das was then a minor as was proved by the proceedings of 1842, in which he appeared to be about eighteen years of age. He also found that if plaintiffs were held entitled to redeem, the *sardarakhti* rights of Neota, &c., had priority over their claim, that the remaining alienees were entitled equitably to be reimbursed the sums paid by them and that further, plaintiffs could redeem only on payment of Rs. 12,797, balance of unpaid interest in addition to the principal sum of Rs. 3,000. The plaintiffs' appeal was of course dismissed.

The case was exhaustively argued before us for two days. The substantial points for determination appear to be—

1. Is the suit for redemption within time ?
2. Have the plaintiffs lost their rights by abandonment or confiscation by Government ?
3. Have the defendants, or any of them, established a right of ownership by adverse possession as purchasers for value without notice.
4. Have any of the defendants equitable rights to be maintained in possession, or to be reimbursed their outlay in acquiring their interests in the land in suit ?
5. If plaintiffs are entitled to redeem what sum, if any, is payable by them ?

We propose to consider the question of limitation first, but before we do so, we leave it on record that we agree with the Divisional Judge that the document of 26th February 1821 is genuine, and that it supplements the mortgage-deed of 11th February, and together with it gives all the terms of the mortgage. There is no doubt that it was written because the original deed did not embody all the terms of the transaction, and the argument that it is without consideration appears to us to be entirely futile. We also overrule the objection of the respondents that the suit is barred because all the plaintiffs did not join in the suit until sixty years had elapsed after the date of the last acknowledgment. It appears that they were joined as parties by order of Court on 26th November 1896, and in any case the original plaintiff was competent to sue alone.

The question of limitation divides itself into three heads: (1) whether the acknowledgments relied on are genuine and amount to such within the meaning of the law, (2) whether Kesho Das was

a minor at the time they were given and (3) whether an acknowledgment by a minor is sufficient in law to save limitation.

As regards the first head we have no doubt that the *mukhtar-nama* of 28th November 1836 and the petition of 3rd December 1836 are both genuine documents. They are attached to a file of inquiry relating to the *mafi* of this land under Regulation 2 of 1819, which has come out of the Court Record-room. Both documents are more than thirty years old, and have been produced from proper custody, and are public documents.

The signature purporting to be that of Kesho Das in Hindi on the *mukhtarnama* should therefore be presumed to be his, and as it describes him as the mortgagee, and this term is clearly used with reference to this land, the document must be held to contain a sufficient acknowledgment of the plaintiffs' right apart from the question of minority. It is scarcely necessary in view of the above finding to discuss the petition, but we see no reason to doubt that it was written and presented by Naunidh Rai whose name appears in it.

On the second head, we think it is amply proved by the file of 1842 that Kesho Das was a minor in 1836 when the acknowledgments were given. The documents on which reliance is placed by respondent to prove this fact are (a) the statement of Kesho Das before the Thanadar of Delhi, dated 29th July 1842, in which he gives his age at 19, (b) that of Naunidh Rai, dated 1st September 1842, before Mr. Ross, in which he states his client's age to be 19, (c) the descriptive roll of Kesho Das in which his age is entered 18 years, and it is stated that hair was just appearing on his face, (d) Kesho Das' own statement, dated 5th September, before the Assistant Commissioner in which his age is put down as 18, and (e) the statement of the Patwari before the Settlement Deputy Collector, Rai Ramsaran Das, dated 9th September 1842, in which he says that in the measurements of 1246 Faslî (about 1830) the land was entered in the name of Manohar Das, *waris* Kesho Das, (f) a certified copy of an entry in the Municipal death register, dated 13th February 1834, in which the age of Kesho Das is given as 60 years.

The proceedings mentioned above in 1836 were taken under Regulation 2 of 1819, for resumption of the rent free tenure. The proceedings in 1842 were in connection with the settlement of land revenue. It would seem that at first the land was thought not to be the property of Kesho Das, and it was proposed to grant him a pension in lieu of the resumed *mafi* but he objected and claimed

that a settlement should be made with him. This was ultimately allowed, and he was then recorded proprietor.

Under Regulation 2 of 1819, the Collector and officers exercising the powers of Collectors were authorized to make inquiries into the circumstances of rent free tenures, and for this purpose to summon and examine witnesses. Similar powers were exercised by Settlement Officers under Regulation 7 of 1822 and Regulation 9 of 1833. The documents referred to by the respondents are public documents within the meaning of Section 74 (1) (iii) of the Evidence Act and documents (b), (d) and (e), and their contents are sufficiently proved by their production under Section 80 of the Act. Similarly under Section 90 the other documents are to be presumed genuine. Mr. Beechey contends that they are not relevant, but in our opinion under Section 35 of the Act the descriptive roll, the entry in the Municipal register of deaths in 1884, and the *patwari's* statement about the entry in the revenue papers in 1246 *Fasli*, are clearly relevant evidence; the first, because descriptive rolls had to be prepared as it was proposed to grant Kesho Das a pension, see *inter alia* Section 11, Regulation 24 of 1803, extended to the conquered provinces on the right bank of the Jumna by Section 11, Regulation 8 of 1805. The second, because such a register has to be kept up by the municipalities in the Punjab, and the last, because such a record had to be made by Revenue officials. The descriptive roll states that Kesho Das' beard and moustache were just coming out which agrees with his age, 18, given in the document, and there is a remarkable coincidence between this and the entry in the Municipal Register of 1884. The identity of the Kesho Das mentioned in the register with the Kesho Rai of the proceedings of 1836 and 1842 is beyond question from the particulars given in both.

The other documents also may be said to be covered by the words of Section 35 as interpreting the word "record" by the terminology of Section 74 (1) (iii), it may perhaps be held to include evidence taken down by a public officer for one of the purposes mentioned in the former.—See *Golindrav Deshmukh v. Ragho Deshmukh* (1) at pages 546, 547.

But even if this were not so, and the point is not free from difficulty, the three documents first mentioned clearly come within Section 35, and are materially relevant to the question of minority.

(1) *L. R., VIII Bom., 543.*

There can be no doubt of the complete trustworthiness of the first two. In 1836 the mortgage was admitted and in 1842 Kesho Das was defending his title and making out his right to be admitted to a Settlement for the land.

In 1884 there was no trace of the plaintiff's intention to sue, and Kesho Das had long before ceased to have any interest in the property. In 1842 he had no object to serve by establishing his minority. We therefore find that he was about 18 or 19 in 1842, and that six years before, when the acknowledgments were written, he was not more than 12 or 13, and clearly a minor under Hindu Law.

We now come to the third head of the discussion.

Mr. Beechey's contention is that the words of Section 19 must be construed as they stand, and that they do not require, in order to constitute a valid acknowledgment, that the person making it should have attained the age of majority. He has not quoted any authority directly in support of his position, but argues on general principles and from the omission of an exception in favour of minors in the section that such is the intention of the Limitation Act.

In our opinion the contention is not tenable. The Limitation Act has no doubt to be construed with reasonable strictness, but it is obvious that effect cannot be given to the bare grammatical meaning of the words of Section 19 without regard to the person who makes the acknowledgment and the circumstances under which it is made. The acknowledgment is an acknowledgment of liability, and it appears to us to be indisputable that (1) it must be meant as such and (2) that the person making it should have a competent understanding of this aspect or nature of his act.

The literal construction of the words of Section 19 of the Limitation Act does not necessitate that mere proof that the words of the acknowledgment were written by or on behalf of the person purporting to make it is sufficient to bind him. As stated by *West, J.*, in *Dharm Vithal v. Gobind Sadrakhar* ⁽¹⁾ at page 102 "that section intends a distinct acknowledgment of an existing liability to serve as a re-creation of it at the time of such acknowledgment; but there cannot be an acknowledgment without knowledge that the party is admitting something * * * * The intention of the law is manifestly to make an admission in writing

⁽¹⁾ *I. L. R.*, VIII Bom., 99.

of an existing jural relation of the kind specified equivalent for the purposes of limitation to a new contract."

This remark was approved by Wilkinson, J., in *Venkata v. Partha Saradhi* (1), though we are not prepared to accept the learned Judge's view as applied to the particular document before him, see also *Jalli and others v. Mahir Pir Bakhs* (2) at page 40.

The person sought to be bound may plead that he had no knowledge of the admission signed by him or that it was obtained by fraud from him, and these defences are not concluded by the mere signature. Similarly the party making the acknowledgment must be possessed of an understanding capable of comprehending its nature.

Mr. Beechey admits that an insane person signing an acknowledgment is not necessarily bound by the same, and he also concedes that if the person is of too tender an age to have a clear comprehension of its character he would not be bound. If Kesho Das was only twelve or thirteen at the date of the acknowledgment relied on, it may be doubted, on the above admission, whether he was really competent to understand the nature of an acknowledgment. Under the Indian Penal Code a child above the age of seven years and under twelve is criminally liable only if he has attained sufficient maturity of understanding to judge of the nature and consequences of his conduct. The rules which govern the liability of minors have their origin mainly in considerations of intellectual deficiency. The most important consideration on which they are founded has always been the absence of that knowledge and experience which is necessary to enable any one to appreciate the consequences of his acts. But it is also obvious that an inquiry into either physical or intellectual capacity in each case would be both difficult and inconvenient, and consequently the necessity for it has, to a great extent, been superseded by laying down certain fixed rules as to liability based simply on the age of the person sought to be made liable. This is the origin of the law of minority, which in India extends except in certain cases to the age of eighteen,—an arbitrary limit which dispenses with all necessity for inquiry into the intellectual capacity of persons within that age. In 1836 the status of minority lasted up to the end of the sixteenth year under Hindu Law.

Minority is therefore a sufficient proof of incapacity of understanding as a ground of non-liability unless the duty or obligation is one for breach of which it does not serve as an excuse. For example in the case of torts minority cannot be

(1) I. L. R., XVI Mad., 227.

(2) 9 P. R., 1897.

pleaded as a defence, though in certain cases inquiry will be permitted into mental capacity, which amounts in other words to this that there is no fixed age limit of non-liability for cases of this class. But irrespectively of these and cases falling under the criminal law, it is a general rule of law "that a minor is not to be "allowed to do anything to prejudice himself or his rights" per Lord Abinger, C. B., in *Oliver v. Woodroffe* (1). It is not merely in cases falling under the law of contract that minority grants immunity from the consequences of acts and omissions. "An "infant is not bound by acquiescence in standing by and allowing "others to act, on the faith that he will do or not do a particular "thing * * *.

"Acquiescence in a breach of trust does not bind an infant * * * "similarly laches will not prejudice an infant, for the presumption of "law is that he does not understand his rights, and is not capable "of taking advantage of the rules of law so as to apply them to his "advantage." *Simpson on Infants*, 2nd edition, 57. The Limitation Act itself saves the rights of minors from the consequences of their omission to sue, and the Civil Procedure Code recognizes their disability from acting for themselves in Courts of Justice. The disabilities of minors cover a much wider field than that of mere contract. A good summary of the law relating to them is given by an old writer quoted in Trevelyan's *Law relating to minors*, 2nd edition, page 15: "the law protects their persons, preserves their "rights and estates, excuseth their laches and assists them in their "pleadings; the Judges are their counsellors, the jury are their "servants, and the law is their guardian."

An acknowledgment of liability under Section 19 of the Limitation Act is closely akin to a contract, though an implied promise to pay does not underlie its binding effect as is the case with an acknowledgment under the law of England.

The real effect and intention of the law is perhaps well put by Mr. Justice West in the passage already quoted from his judgment in *Dharma Vithal v. Gobind Sadvalkar* (2), but even if it were not so there is, in the acknowledgment, a clear waiver of the time that has already run which operates to the prejudice of the minor, but which on general principles cannot be allowed to have that effect as in consequence of his immaturity of understanding he is incapable of using and applying rules of law to his own advantage.

Mr. Justice Trevelyan says that an acknowledgment by a minor would only be efficacious in a case of contract which he

(1) 4 *M. and W.*, 653. (2) 1 *L. R.*, VIII *Bom.*, 99.

could avoid, and would have no effect on any other cause of action, page 306.

Mr. Beechey has not quoted a single case in support of the view advanced by him, and we have been unable to lay our hands on a reported Indian case on the question before us. We look on this as proof that the matter is too clear and too universally admitted to be disputed.

We have no hesitation in finding that the acknowledgments are inoperative in consequence of the minority of Kesho Das when they were written, and that the plaintiffs' claim is consequently barred by time.

This is sufficient to dispose of the appeal, and we do not therefore think it necessary to go into any other question arising in it, and merely leave on record that we substantially agree with all the findings of fact arrived at by the Divisional Judge, besides those already discussed. The appeal is dismissed with costs.

Appeal dismissed.

No. 60.

*Before Mr. Justice Clark, Chief Judge, and Mr. Justice
Robertson.*

GUL MUHAMMAD,—(DEFENDANT),—APPELLANT,

Versus

MUSSAMMAT WAZIR BEGAM,—(PETITIONER),—
RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 13 of 1901.

Guardian—Appointment of—Guardian and Wards Act, 1890, Section 17—Application by a Muhammadan maternal grandmother to be appointed guardian of her Muhammadan minor grandchildren who were in the custody of their father who had changed his religion—Father's right to custody—Act XXI of 1850, Section 1.—Interpretation of the expression "rights"—Equity.

Held, that the law in India while placing all religions on a level before the law and allowing to the fullest extent the rights of aggregations of individuals to be governed by their own personal law, protects individuals so far as may be from the loss of either rights or property by reason of renunciation of or exclusion from any religion or caste.

Held also, that the expression "rights" in Section 1 of Act XXI of 1850 includes something more than actual rights in property, and that the right to the guardianship and custody of his children by a Muhammadan who has been converted to Christianity is a right within the meaning of Act XXI of 1850.

Held, further, that the father who was the only living parent and who had the custody of his children and was making suitable provision for

their up-bringing should not lose his natural rights on the ground of change of his religion.

*Miscellaneous first appeal from the order of Lala Chuni Lal,
District Judge, Delhi, dated 20th December 1900.*

Kirkpatrick for appellant.

Muhammad Shafi for respondent.

The facts and arguments are fully set out in the judgment of the Court, which was delivered by

6th April 1901.

ROBERTSON, J.—The facts of this case are very simple. One Gul Muhammad, a Muhammadan widower, has two children, one aged between 8 and 9, a boy, and the other aged between 4 and 5, a girl.

On the 15th April 1900, appellant, Gul Muhammad, embraced the Christian religion and was baptized, and the next day both children were also baptized. The children were both with their father, and are now in his custody, the girl having been placed by him in charge of a missionary lady at a Girls' School in Delhi.

The maternal grandmother, one Mussammnat Wazir Begam, claims to be appointed guardian to both the minor children under Act VIII of 1890, and also to be appointed guardian of the property.

The case was tried by the District Judge of Delhi, who rejected the application as regards the boy and the property, but allowed it as regards the person of the girl, holding that the father had lost his rights of guardianship by his apostacy from the Muhammadan religion, and that his rights were not saved by the operation of Act XXI of 1850, which the District Judge held not to apply.

From this decision both sides have appealed, and we propose, first, to consider the appeal of the father, who claims the right of guardianship over the girl.

The learned counsel for the appellant put his case in the form of four propositions, and it will be a convenient method of disposing of this appeal to deal with these propositions *seriatim*. They are as follows:—

I.—Act XXI of 1850 does apply and governs this case.

II.—Proposition I having been established, the appellant has the same rights regarding the girl, his daughter, as he would have had as a Muhammadan, and these amount to guardianship and control, although the actual custody of the girl, *i. e.*, the *hizanat*, would remain till the age of puberty with the mother's mother, who is the claimant in this case.

III.—Under Act VIII of 1890, the welfare of the minor and the dictates of equity are the first considerations, overriding special personal laws; and, in accordance with these principles, the father should be made guardian of his daughter.

IV.—It is clearly for the welfare of the girl that the father should be the guardian in this case.

The first and the most important question which we have to consider in this case is whether or not it comes within the purview of Act XXI of 1850.

Turning, first, to the wording of the Act itself, we are unable to see any ground whatever for the view that the "rights," forfeiture of which is alluded to, are rights of property only. The terms of the single section of the Act do not appear to us to be capable, under any circumstances, of that interpretation. The section says in plain and unmistakable language that "so much of any law or usage now in force . . . as inflicts on any person "forfeiture of rights or property, or may be held in any way to "impair or affect any right of inheritance, by reason of his or her "renouncing, or having been excluded from the communion of any "religion, or being deprived of caste shall cease to be enforced as "law."

It has been laid down by Sir Barnes Peacock in *Srimati Matangini Debi v. Srimati Jaykli Debi* (1) that Section 1 of the Act is to be considered entirely independent of the preamble, but even if this view be not accepted, it was argued by the counsel for the appellant, and we think with much force, that this view is entirely in accord with the preamble and in no way at variance with it. The preamble recites that "it will be beneficial to extend "the principles". . . . (of Regulation VII of 1832, Section 9); not, be it observed, the provisions, but the principles, throughout the territory of the East India Company. The "principles" here enunciated are clearly, it is urged, that so far as enactment can prevent it, no one shall in British India suffer for his religious convictions. It is an enactment in favour of freedom of conscience, and that principle is fully carried out in the section itself. The "principle" clearly is, it was contended, not, as suggested to us by the learned counsel for the respondent, that no "apostate" shall actually lose property, that is a mere detail resulting from the principle, but that, so far as can be avoided, no one shall suffer for conscience's sake. In face of the clear wording of the Act, and in the absence of

(1) 5 B. L. R., 492.

any authority quoted to the contrary, we are unable to see upon what ground Mr. Amir Ali bases the *dictum* at page 257 of the 2nd Edition of Volume II of his book on Muhammadan Law that "the provisions of Act XXI of 1850 make no alteration of the Muhammadan Law bearing on this subject. The effect of that Act is confined to questions of inheritance." The wording of the Act certainly does not confine its operation to questions of inheritance, and no legal authority has been quoted to us which goes so far as to say that its provisions are so restricted. Although there may be differences of opinion as to the actual scope of the word "rights," no authority has been quoted to us which limits it to questions of inheritance only.

Turning from the Act itself to the authorities on the subject, we propose to discuss, first, those which take the more restricted view of its operation.

The first case quoted to us was "*In the matter of Mahin Bibi.*" (1). This was the decision of a single Judge of the High Court of Calcutta, and the words relied on in that judgment (Macpherson, J.) are: I am clearly of opinion that, so far as concerns the marriage of his daughter, a Muhammadan . . . Cohen was not the guardian of the daughter, he being an apostate from the Muhammadan faith. His consent consequently was not necessary. And "he being an apostate, the mother's consent, she being a Muhammadan woman (which was in fact given), is sufficient." That was a peculiar case, the father, a Jew, who had turned Muhammadan, and then again turned Jew, wished to enforce the right of a Muhammadan father to annul a marriage already contracted by his Muhammadan daughter, the mother being alive and having consented, and the girl being in her husband's custody, and the words quoted were used in an order dismissing an application by the father against the girl's husband for "*habeas corpus.*" But the judgment is not of much weight, even were it not clearly distinguishable, in this case, because it is clear that neither the provisions of Act XXI of 1850, nor the ruling of a Division Bench of the Calcutta High Court in *Muchoo and others v. Arzoon Sahoo and others* (2) were brought to the notice of the Court or discussed in any way. The judgment is quoted, with approval no doubt, in Wilson's book on Muhammadan Law, and he points out, what no doubt was the consideration which led to the order in that case, *i. e.*, that the Act speaks only of "forfeiture of rights or property" whereas the question here is as to the fitness of an infidel for the discharge of an important *duty* affecting the

(1) 13 B. L. R., 160.

(2) 5 W. R., 235.

welfare of a third party who is a Moslem, and of the family who are also Moslems (¹).

The next authority to which our attention was called by the learned counsel for the respondent was the judgment of this Court in *Nourroz Ali v. Mussammat Aziz Bibi and another* (²). In that case a Muhammadan husband who had apostatized sued for the custody of his wife, and so far as the interpretation of Act XXI of 1850 was concerned, all that was held was that Act XXI of 1850 had not altered or affected the Muhammadan Law in respect of cancellation of marriage by apostacy. This was held by two Judges, the third Judge dissenting. But, although there was some difference of opinion as to how far the preamble of the Act could be considered in connection with the Act itself among the Judges in that case, all were agreed that the word "rights" in the Act, of which forfeiture is not to occur, meant much more than mere rights of property. As one of the Judges put it, "Rights on property" is not a mistake for "Rights of property." The *dictum* of Mr. Amir Ali, and the contention of the learned counsel for the respondent on that point, therefore, receives no support from that judgment. The main principle underlying the judgment of that Bench appears to be embodied in a sentence which we quote from the judgment of Boulnois, J. "Whilst the Muhammadan Law relating to apostacy "inflicts on an apostate forfeiture of rights over his wife acquired "by marriage, it also creates in favour of the wife a right to "regard the marriage contract as dissolved." And the Judges held that the right of the wife to this relief was stronger than any right which the husband could allege under Act XXI of 1850. That case is, therefore, clearly distinguishable from this. The remark of Mr. Justice Plowden in his judgment in *Mussammat Khan Bibi v. Pir Shah* (³) does not appear to us to carry the matter much further. He says "If any opinion were necessary in this case, I "should be disposed to hold that a rule of Law which directly de- "termines the status of a person, the personal relation between him "and another or others, is to that extent scarcely within the purview "of the Act. But this is not necessary to be decided."

No further authorities were quoted to us in favour of the view that Act XXI of 1850 only covers questions of property or inheritance, or that it does not apply to questions of the nature involved in this case.

In favour of the view that the present case comes within the purview of the Act, the opinion of Mr. Trevelyan, given at page 62

(¹) Wilson on *Anglo-Muhammadan Law*, p. 99, Section 95.

(²) 124 P. R., 1876. (³) 132 P. R., 1884.

of the Tagore *Law Lecture* for 1877, was quoted. He says "since "the passing of the Act XXI of 1850, such a right of guardian-ship ceased to be affected by a change of religion or loss of caste."

The next authority brought forward was the judgment of the Allahabad High Court in *Kanahi Ram v. Bddiaya Ram* ⁽¹⁾. That was a claim involving the custody of a daughter, and, admittedly, very much against their inclinations in that particular case, the learned Judges found that (in the words of Pearson, J.) "The appellant has, in my opinion, failed to show that, because the defendant has been put out of caste by the members of his brotherhood on account of his intending to give his infant daughter, aged 11 years, in marriage to a man said to be more than seventy years old and impotent, in consideration of receiving from him about Rs. 400, he (the defendant) has, according to Hindu Law, lost his right as guardian to the custody of the said girl; and such a contention, even were it supported by Hindu Law, must be disallowed in reference to the provisions of Act XXI of 1850." This is an unequivocal finding that rights of guardianship over infants are "rights" within the purview of Act XXI of 1850.

The judgment of the Calcutta High Court in *Muchoo and others v. Arzoon Sahoo and others* ⁽²⁾ is equally clear, and is one which deserves most careful consideration. In that case a convert to Christianity from the Hindu religion claimed the custody of his wife and three young children. The claim to the custody of the wife was dismissed, on the ground, as stated by Campbell, J., "simply for the reason that, admitting the husband's *prima facie* claim to the custody of his wife, that claim can be defeated by a "reasonable plea." In regard to the custody of the children which was decreed, as regards the two elder children, and as regards the youngest so soon as it attained the age of 4, the judgment of Mr. Justice Campbell contains the following, which we quote in full:—

"Under the provisions of Regulation VII of 1832 it is enacted "that, in certain suits regarding succession, inheritance, marriage, "caste, and all religious usages and institutions between parties of "the Hindu and Muhammadan religions respectively, the law of "their respective religions is to be administered, but in respect of "all other suits between any parties, and all suits of every kind in "which both parties are not of the same persuasion, the only law "is that of justice, equity, and good conscience. Upon this provision of the law, the pleader for the appellant seeks to argue that,

⁽¹⁾ *L. L. R., 1 All., 549.* ⁽²⁾ *5 W. R., 235.*

“on principles of justice, equity and good conscience, the custody of the children should remain with the wife, and not with the husband, because, he says, at the time of the marriage it was understood, and as it were impliedly contracted, that the parties should remain Hindus, and therefore one of the parties having abandoned the Hindu religion, should not be permitted to claim the children, the fruit of the marriage, to the exclusion of the party who continues in the religion which they both professed at the time of the contract of connubium,

“This contention may possibly admit of reasonable argument. I cannot, however, think that, even if there were no further provision of law, this equitable claim on behalf of the mother would prevail to such an extent as to override the very strongest natural right of the father—the right to the custody of his own children. But, be that as it may, I think that we are relieved of all questions regarding the construction of the old Regulations by the express provisions of Act XXI of 1850, which so far extends the principle of Regulation VII of 1832 that, whereas the last mentioned Regulation contained an express provision to the effect only that where one or more of the parties to a suit should not be of the Hindu or Muhammadan persuasion, the law of the religion should not be permitted to operate to deprive either of any “property” to which he may be entitled. Act XXI of 1850 so far extends that provision as to enact that no law or usage hitherto in force shall inflict on any person who renounces his or her religion any forfeiture of ‘right or property,’ the word ‘right’ being superadded. It seems to me clear that the right to the custody of children is a right within the meaning of Act XXI of 1850.

“The pleader for the appellant further argued that no one can be permitted so to use his right as to deprive any other person or persons of their rights. For instance, he says, a husband who becomes a Christian will not be permitted to claim the person of a wife who remains a Hindu. This is so far true, and in this case the claim to the wife was rightly dismissed, but was, I think, dismissed simply for the reason that, admitting the husband’s *prima facie* claim to the custody of the wife, that claim may be defeated by a reasonable plea. If a wife pleads that her husband beats and ill uses her in such a way that she cannot reasonably be required to live with him, and that plea is made out, doubtless the Court will not enforce a restitution of conjugal rights. So also, if she pleads that the husband, by change of religion, has placed himself in that position that she cannot live with him without doing extreme violence to her religious opinions and the social feelings

“in which she has been brought up and in the enjoyment of which she married, that plea would also be a good plea.

“I have no doubt that if the children, even though not legally majors for the purposes of property, had arrived at that age of discretion that they could plead an intelligent and distinct preference for the Hindu religion, the Court would probably not forcibly deliver them up to the father. But that is not alleged in this case. The exact age of the two elder children is not precisely mentioned, but as the youngest was under 4 years old, a mere infant, and as it has not been pleaded that the others are very much older, we may presume that the two elder children are of such an age that, while it is no longer necessary for them to remain with the mother for the purposes of nurture, they are not capable of fully judging and acting for themselves with regard to religion.

“That being so, I think that the Judge rightly ordered the two elder children to be delivered up, and rightly ordered that the third child should be delivered up when, emerging from the mere state of infancy, it reached the age of four years;” and Mr. J. Kemp, who concurred, in the course of his judgment said, “The inherent right of the father to the custody of his children, not only as guardian by nature, but by nurture, is a right recognised by the English as well as the Hindu Law. Of this right the father is not deprived because he has become a convert to Christianity, though he may have become ‘potit,’ degraded according to the dictates of the Hindu Law, for Act XXI of 1850 clearly enacts that no person shall by reason of his renouncing or having been excluded from the communion of any religion forfeit his rights or property.”

So far as we are aware, that ruling has never been dissented from, and it went the length of giving the custody of three children, born as *Hindus* of a *Hindu* marriage, to the Christian father expressly in accordance with his rights under Act XXI of 1850, even though in that case the Hindu mother was herself alive, still a Hindu, and in actual custody of the children.

That case, therefore, appears to be a much stronger one than the one now before us in which the father is the sole surviving parent, and the children are actually in his custody, the father in this case being a convert from Muhammadanism and in that from Hinduism.

We are, therefore, in accord with all the authorities quoted to us on either side, with the exception of the unsupported *dictum* quoted from Mr. Amir Ali's book, in holding that the “rights” from the forfeiture of which one who changes his religion is protected

by Act XXI of 1850, are rights other than those merely of property or inheritance, and may extend to rights of guardianship over infant children. The law of India, while placing all religions on a level before the law and allowing to the fullest extent the right of aggregations of individuals to be governed by their own personal law ; as noted in the judgment quoted, and laid down in Section 5 of our Punjab Laws Act, protects individuals, so far as may be, from the loss of either rights or property by reason of renunciation of, or exclusion from any religion. It is, however, clear, and has been recognised in all the rulings quoted that the preservation of such rights must be consistent also with the preservation of the rights of others and when these clash, the Courts have to decide between rival interests according to justice, equity and good conscience.

After considering the authorities quoted, therefore, and the arguments addressed to us we concur in the view taken by the Calcutta and Allahabad High Courts, and not contravened by any rulings quoted to us, that the right of the guardianship of infant children is one which comes within the term "rights" in the following clause of Act XXI of 1850, "as inflicts on any person forfeiture "of rights or property," and that, therefore, the provisions of that Act apply to and govern this case so far as that part of the question is concerned.

We, therefore, hold that the appellant in this case has the same rights in regard to the custody of his children as he would have had had he remained a Muhammadan. It is not contended that his rights have in any way become more extensive by the fact of his becoming a Christian, and we are unable to see that the fact that he has had his children, who are not of an age to profess Christianity of their own choice, baptized into the Christian Church, can have any legal effect on the question at issue. With the religious tenets as to its spiritual effects which may be held by Sections of the Christian Church we are not here concerned, we are only dealing with the legal effect of the baptism of infants in this connection.

At the same time we must deal with one other contention, put forward by the respondent. This was, that a Muhammadan child, born of a Muhammadan marriage, has an inherent right to be brought up as a Muhammadan. This is a contention which we cannot accept. No doubt, the professors of every creed would consider it a right of the children born of parents professing that creed to be brought up in it, but no such right on behalf of infants unable to claim it for themselves can possibly be recognised on behalf of the religious body to which the parents may have belonged

at the time of the child's birth, against the parents of such infants. Such a claim would never be allowed to override the natural right of the parents should they change their religion, and is a claim which could hardly be seriously pressed when put forward on behalf of children altogether too young to understand any of the questions involved. We, therefore, now proceed to discuss what the rights of a Muhammadan father would be under the present circumstances, and what course, acting as a Court of Equity, we ought to pursue in regard to the appointment of a guardian under Act VIII of 1890.

In regard to the second proposition put forward for the appellant the contending parties are practically in accord that, under Muhammadan Law, the father is the natural guardian with full and ample powers of supervision, and the mother's mother in this case would be naturally entitled to the actual custody or "hizanat" of the children, in the case of a boy up to the age of 7, and in the case of a girl up to the age of puberty. As regards the boy in this case, therefore, it follows from what we have decided above, that the father is the proper guardian and the appeal against the Lower Court's decision on this point will be dismissed.

As regards the girl, however, further considerations have to be entertained. It appears that the present claimant, the girl's grandmother, was offered the custody of the girl before her father became a Christian, and refused it. Under ordinary circumstances this fact would not be of much consequence, but it shows, and this is borne out by the petitions of the claimant itself that the object of the grandmother is the very natural one in a Muhammadan no doubt, of getting the child away from her Christian father on account of his change of religion. In this country, and in this case, we start with no initial presumption that it is better for the child to be a Muhammadan, or better that it should be a Christian. But we do think it quite clear that nothing could be worse for the child than that she should be brought up in a Muhammadan house by her grandmother until the age of puberty when she would have to be made over to her father, and subject, while with her grandmother, to the supervision of her Christian father to which he is clearly entitled. There would thus be constant strife between the faith of her father and the faith of those about her, constant bickerings and much unhappiness to herself. Such an arrangement is obviously an impossible one. Either the girl must be left with her father, or given up entirely to her mother's relatives. We have to consider in this case, above all things, the welfare of the minor, and there being no presumption that it is better for the child to be

brought up as a Muhammadan rather than as a Christian; or, *vice versa*, we have to consider what is best for the child as the matter stands, and we are unable to see any good reason for holding that anything is better for the child than that she should be left with her only surviving parent. The application is one under Act VIII of 1890 and the general conditions which are to govern the action of the Courts in such matters are recited in Section 17 of that Act, principles entirely in accord with the views taken in the various authorities quoted to us and which we have considered (*Helen Skinner v. Sophia Evelina Orde* ⁽¹⁾ in the matter of *Joshy Assam*). ⁽²⁾

The two cases quoted by the learned counsel for the respondent *Barkurdar Khan v. Mussammat Ghulam Fatima* ⁽³⁾, decided by Mr. Justice Rivaz of this Court sitting alone, and *McKand Lal Singh v. Nobodip Chunder Singha* ⁽⁴⁾, decided by a division bench of the Calcutta High Court, do not help the respondent's contention that the father should not be declared guardian, and allowed the custody of the girl. In each of these cases it was accepted as incontestable that the father was *prima facie* the natural and proper guardian of his infant child, but in each case the infants had been left, in the one case with their mother, in the other with near relatives, to be brought up in the Hindu religion, and it was only when the children had been for some years under Hindu training without objections by the father, that he brought a suit for their custody which was, on equitable grounds, dismissed. Here, the case is quite otherwise, the father has the custody of his children; he is clearly making suitable provision for their up-bringing; he is the only living parent, and, with the exception of his "apostacy" as it is naturally viewed by the other side, nothing whatever is alleged against him; the Act XXI of 1850 protects him from the loss of any rights he may naturally possess on the ground of change of religion, and there is no equitable ground, and there are no rights existent on the part of any one capable of asserting them which can be held on any equitable ground on which we ought to override the right of the father.

We consider, therefore, that the claim of Mussammat Wazir Begam to be appointed guardian of the two children must be dismissed, and we accordingly dismiss it with costs throughout. We understand that the appellant's father is also a sharer in the property owned by the children, and, having dismissed the claim of Mussammat Wazir Begam as regards the children, we consider

⁽¹⁾ *Privy Council, X B. L. R., p. 125.*

⁽²⁾ *I. L. R., XXIII Calc., p. 290.*

⁽³⁾ *P. R., 84, 1894.*

⁽⁴⁾ *I. L. R., XXV Calc., p., 881*

that the claim to guardianship of the property should be dismissed also, and the claim and appeal on this point is also dismissed with costs throughout. The appeal of Gul Muhammad, appellant, is allowed with costs against respondent throughout.

No. 61.

Before Mr. Justice Clark, Chief Judge, and Mr. Justice Robertson.

ATMA SINGH AND ANOTHER,—(PLAINTIFFS),—
APPELLANTS,

Versus

NAUDH SINGH,—(DEFENDANT),—RESPONDENT.

Civil Appeal No. 845 of 1898.

Custom - Gift—Validity of gift to a near agnate, not actually an heir of the donor—Dhat Jats of tahsil and District Hoshiarpur.

In a suit by a nephew of the donor to set aside a gift made by his uncle on account of services rendered to him in favour of a near agnate, who was not actually his heir, the parties being Dhat Jats of the Hoshiarpur tahsil, held that the gift was valid by custom.

Bhagwana v. Mothu ⁽¹⁾, *Sobha v. Gyana* ⁽²⁾, *Gopal Singh v. Kheman* ⁽³⁾, *Indar v. Luddar Singh* ⁽⁴⁾, *Sher Singh v. Sohail Singh* ⁽⁵⁾, *Narain Singh v. Gurmukh Singh* ⁽⁶⁾ and *Rala v. Bauna* ⁽⁷⁾, referred to.

Further appeal from the decree of Captain C. S. Martindale, Divisional Judge, Hoshiarpur Division, dated 20th May 1898.

Harris, for appellants.

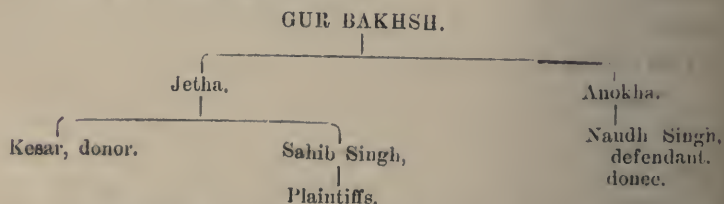
Muhammad Shafi, for respondent.

The judgment of the Court was delivered by

13th April 1901.

CLARK, C. J.—The parties are Dhat Jats of tahsil and District Hoshiarpur.

They are related as follows :—



In 1880 Kesar gave his land 127 kanals 6 murlas to Naudh Singh and gave him possession and mutation of names.

⁽¹⁾ 62, P. R., 1884.

⁽²⁾ 116, P. R., 1886.

⁽³⁾ 85, P. R., 1889.

⁽⁴⁾ 18, P. R., 1890.

⁽⁵⁾ 19, P. R., 1890.

⁽⁶⁾ 116, P. R., 1894.

⁽⁷⁾ 14, P. R., 1901.

We agree with the Divisional Judge that the gift was on account of services rendered, that Naudh Singh paid off Kesar Singh's revenue balance and debts, and maintained him at all events till within a couple of years of his death which occurred about 1895.

We think it is established that by custom of Jats of the neighbourhood of parties a childless proprietor can gift his land to one of several heirs, who has rendered him services.

Bhagwana v. Mothu ⁽¹⁾, *Sobha v. Gyana* ⁽²⁾, *Gopal Singh v. Kheman* ⁽³⁾, *Indar v. Luddar Singh* ⁽⁴⁾, *Sher Singh v. Sohail Singh* ⁽⁵⁾, *Narain Singh v. Surmukh Singh* ⁽⁶⁾, and *Rala v. Banna* ⁽⁷⁾.

The question in this case is whether this right extends to a gift to a near agnate who is not actually an heir of the donor.

No express authority on the subject has been quoted, but the rulings referred to above show that the powers of alienation possessed by the Jats of Hoshiarpur are extensive.

Sir M. Plowden in *Narain Singh v. Gurmukh Singh* ⁽⁶⁾ said :
 "The case seems to show that where there is a sort of moral obligation to compensate for services rendered, there is sufficiently good consideration to support a gift to one of the heirs, to the exclusion of the rest."

It is not a much further step to support the gift to a near kinsman though he is not an actual heir.

The validity of the gift is based partly on the necessities of the donor, and if the next heir were an infant, or were impoverished, or hostile to the donor, the necessities of the donor could only be adequately met by a gift to a more remote heir.

In the case of appointment of an heir, a kinsman, not necessarily one of the heirs, may be appointed (*vide* Rattigan's *Digest*, para. 35, and *Mutsoda Singh v. Deri Ditta* ⁽⁸⁾), and we do not see why there should be a different principle in the case of gifts for services.

The fact that the plaintiffs never questioned the gift from 1880 till 1897 though the donee was in possession before their eyes, suggests that they considered the gift to be valid.

We hold that the gift was valid by custom and we dismiss the appeal with costs.

Appeal dismissed.

⁽¹⁾ 62, P. R., 1884.

⁽²⁾ 116, P. R., 1886.

⁽³⁾ 85, P. R., 1889.

⁽⁴⁾ 18, P. R., 1890.

⁽⁵⁾ 19, P. R., 1890.

⁽⁶⁾ 116, P. R., 1890.

⁽⁷⁾ 14, P. R., 1901.

⁽⁸⁾ 83, P. R., 1892.

No. 62.

Before Mr. Justice Reid.

GOPAL SHAH,—(DEFENDANT),—APPELLANT,

Versus

ARURA,—(PLAINTIFF),—RESPONDENT.

Civil Appeal No. 1097 of 1899.

*Limitation,—Limitation Act, 1877, Schedule II, Article 95—Suit for rectification of a deed on the ground of fraud.**Held* that the limitation for a suit for rectification of a deed on the ground that the defendant induced the plaintiff to allow certain conditions to be entered in it by fraud, is provided for in Article 95 of the Second Schedule of the Limitation Act.*The Advocate General of Bombay v. Bai Panjabai* ⁽¹⁾ distinguished.*Further appeal from the decree of Major E. Inglis, Divisional Judge, Sialkot Division, dated 31st July 1899.*

Ishwar Das, for appellant.

The judgment of the learned judge was as follows:—

18th April 1901.

REID, J.—The lower Appellate Court has found that the plaintiff-respondent was aware of the terms of the mortgage deed in suit at the date of execution, *i.e.*, more than three years before suit, but has held that Article 120 of the Second Schedule to the Limitation Act applies, and that the suit was therefore within time.

The only authority in favour of this conclusion appears to be *The Advocate General of Bombay v. Bai Panjabai* ⁽¹⁾, in which Farran, J., held that the suit before him was not for rectification of a deed, but against an executrix and her assigns, the trustees of the deed, for the purpose of following the trust property in their hands, and having it applied to the proper purposes of the trust, and that Section 10 of the Act applied.

The learned Judge further held that, if Section 10 did not exclude the suit from the limitation law, Article 120 would no doubt apply, but this was *obiter*, and unnecessary for the decision of the suit.

As pointed out in the notes to *Starling's Limitation Act*, the learned Judge, for whose opinion I have great respect, appears to have overlooked Articles 95 and 96, which provide periods of limitation for relief on the ground of fraud and mistake, and, under Section 31 of the Specific Relief Act, rectification of a deed can only be granted on one of these grounds.

⁽¹⁾ *I. L. R.*, XVIII Bom., 551.

The respondent distinctly alleged fraud, and Article 95 consequently applies.

(The remainder of the judgment is not material for the purposes of this report.—ED., P. R.)

No. 63.

Before Mr. Justice Reid.

CHOUDRI GURMUKH SINGH,—(DECREE-HOLDER),—

APPELLANT,

Versus

MUSSAMMAT MIRZA NUR,—(JUDGMENT-DEBTOR),—

RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 796 of 1900.

Civil Procedure Code, 1882, Section 244—Execution proceedings—Jurisdiction of Court to entertain application after full satisfaction of the decree being entered—Procedure—Review—Appeal—Appeal from an order of declining to review the previous order.

Section 244 of the Civil Procedure Code does not apply to a Court which has fully executed a decree and has thereby become *functus officio*, it applies only to a Court executing a decree at the time when an application connected with execution is made; therefore, where a judgment-debtor, after the final settlement had been effected and the execution proceedings terminated, full satisfaction of the decree being entered and the execution record being consigned to the Record-room, made an application to the Court for the refund of a certain amount alleged to have been recovered from him by the decree-holder in excess of the sum due under the decree, held that the only course open to the judgment-debtor was to apply for a review of the order declaring the decree satisfied and striking off the execution proceedings, but that where no objection to jurisdiction had been taken in the Court below and the *forum* for the application for review was the same as the form selected by the judgment-debtor for the application for refund, the latter application might be treated as an application for review.

Held, further, that an order declining to review a previous order was not appealable.

Fakhr-ud-din Muhammad Ahsan v. The Official Trustee of Bengal ⁽¹⁾, *Sadasiva Pillai v. Ramalinga Pillai* ⁽²⁾, and *Aziz-ud-din Hossein v. Ramanagra Roy* ⁽³⁾, followed. *Haji Ahmad Husain v. Sundar Lal* ⁽⁴⁾ distinguished.

Further appeal from the order of Khan Bahadur Syed Muhammad Latif, Additional Divisional Judge, Rawalpindi Division, dated 6th June 1900.

Becchey, for appellant

Oertel, for respondent.

⁽¹⁾ *I. L. R.*, X *Calc.*, 538.

⁽²⁾ 24, *W. R.*, 193 (P. C.).

⁽³⁾ *I. L. R.*, XIV *Calc.*, 605.

⁽⁴⁾ 80, *P. R.*, 1893.

The judgment of the learned Judge was as follows.—

18th April 1901.

REID, J.—The first question for decision is whether the course adopted by the respondent in applying for a refund of a sum alleged to have been recovered through the executing Court was correct. The only authority in point cited is *Fakir-ud-din Muhammad Ahsan v. The Official Trustee of Bengal*(¹).

The decree of which execution was obtained was passed in February 1884 for Rs. 1,250 and costs, which are alleged to have amounted to Rs. 13, and on the 4th March 1896, a final settlement was effected and execution proceedings terminated, full satisfaction of the decree being entered and the execution record being consigned to the Record-room. On the 3rd March 1899 the respondent applied for refund of Rs. 279-3-3, which she alleged to have been recovered by the decree-holder-appellant in excess of the sum due under the decree. No objection to the procedure adopted was taken by the appellant in either Court below.

The ruling in *Fakhr-ud-din Muhammad Ahsan v. The Official Trustee of Bengal*, from which I see no reason to dissent, is that Section 244 of the Code of Civil Procedure applies only to a Court executing a decree, at the time when an application connected with execution is made, and does not apply to a Court which has fully executed a decree and has thereby become *functus officio*, and that the proper remedy is by application for review of the order which declared the decree satisfied and struck off the execution proceedings.

The next question for decision is whether it is necessary to set aside the proceedings of the Courts below as being without jurisdiction. The *forum*, both for the application for review of judgment and for an appeal, if any, from the order passed in review, would have been the same as the *forum* selected for the application for refund and for the appeal from the order dismissing that application, and, as above stated, no objection to jurisdiction was taken below. *Haji Ahmad Hussain v. Sundar Lal* (²) is, in my opinion, inapplicable where the Court in which the application for the erroneous remedy is filed is competent to entertain an application for the proper remedy, and, following the rulings in *Sadasiva Pillai v. Ramalinga Pillai* (³) and *Aziz-ud-din Hossein v. Ramanagra Roy* (⁴). I treat the application of the 3rd March 1899 as an application for review. The ground on which the Calcutta Court in *Fakhr-ud-din Muhammad Ahsan v. The Official Trustee of Bengal* declined to treat the application

(¹) I. L. R., X Cal., 538.

(²) 80, P. R., 1893.

(³) 24, W. R., 193 (P. C.)

(⁴) I. L. R., XIV Cal., 605.

as one for review was obviously that the form of the application was objected to at the earliest opportunity, and does not exist in this case.

Time has been allowed to counsel for the respondent to cite authority for the order, declining to review the previous order being appealable, and counsel admits that no appeal lies. Treating the application to the Court of first instance as an application for review, the Court was bound to reject it. The order of the lower Appellate Court must, therefore, be set aside, but, under the circumstances, the point not having been raised in the memorandum of appeal to this Court, I leave the parties to pay their own costs.

Appeal allowed.

No. 64.

Before Mr. Justice Reid.

JOWAND SINGH AND OTHERS,—(DEFENDANTS),—
APPELLANTS,

Versus

SARDAR INDAR SINGH,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 906 of 1900.

Easement—Private right of way—Obstruction—Special damage, Ne cessity of—Injunction.

In order to maintain an action for obstructing a way a person must suffer some substantial damage peculiar to himself, beyond that suffered by the rest of the public who use the way, where the respondent purchased a *tavela* from the appellant about 25 years before suit and the appellant had within two years of the suit obstructed a way which had in the interval been used continuously by the respondent and others having business with him as the direct way to the *tavela*, and the only alternative way being circuitous and practically impassable for carts in wet weather, held, that the respondent had sustained a particular direct and substantial injury inasmuch as the value of the property (*tavela*) has been diminished by the obstruction, access thereto being necessary for the profitable enjoyment thereof, and was therefore entitled to maintain the suit.

Winterbottom v. Carly ⁽¹⁾, *Ricket v. Metropolitan Railway* ⁽²⁾, *Sidd-s-wara v. Krishna* ⁽³⁾, *Fattehyab Khan v. Muhammad Yusuf* ⁽⁴⁾, and *G. I. P. Railway Company v. Nauraji Pestanji* ⁽⁵⁾, referred to.

Further appeal from the decree of Rai Bahadur Lala Buta Mal, Divisional Judge, Lahore Division, dated 15th June 1900.

Beechey and Shib Das, for appellants.

Grey and Roshan Lal, for respondent.

⁽¹⁾ *L. R.*, II Ex., 316.

⁽³⁾ *L. L. R.*, XIV Mad., 177.

⁽²⁾ 31, *L. J.*, Q. R., 257.

⁽⁴⁾ *L. L. R.*, IX All., 434.

⁽⁵⁾ *L. L. R.*, X Bom., 390.

The following judgment was delivered by the learned Judge :—

19th Jan'y. 1901.

REID, J.—This appeal was admitted by Mr. Justice Rattigan, on the ground that it was doubtful whether the plaintiff-respondent was entitled to a decree, the lower Appellate Court having apparently found that no special damage had accrued to him.

I overrule the preliminary objection that no point of law arises under Section 40 of the Punjab Courts Act.

I understand the judgment of the lower Appellate Court to mean that special damage accrued to the plaintiff-respondent from the obstruction to the road to his *tavela*, but not from the other obstructions complained of, and Section 40 contemplates an appeal on the ground that the special damage found by the lower Appellate Court is not such damage as on the authorities, would entitle the respondent to maintain a suit. The facts proved or admitted are that the respondent purchased a *tavela* from the appellant about 25 years before suit and that within two years of suit, the appellant obstructed a way which had in the interval been used continuously by the respondent and others having business with him, as the direct way to the *tavela*, and that the only alternative way is circuitous way and practically impassable for carts in wet weather.

In *Winterbottom v. Lord Derby* ⁽¹⁾, cited by counsel for the appellant, Kelly, C. B., said: "The rule of law on the subject, which is well laid down in the case of *Ricket v. Metropolitan Railway Company* ⁽²⁾, is that, in order to entitle a plaintiff to maintain an action, he must show a particular damage suffered by himself over and above that suffered by all the Queen's subjects In *Iveson v. Moore*, Lord Raymond, 486, the plaintiff was the possessor of a colliery and was obliged, in order to obtain the profits of his trade to take laden carts and waggons almost every day, along a certain highway. Then, by reason of that highway being obstructed, he personally sustained pecuniary damage. That was clearly special damage done to the plaintiff alone. Once more, look at another case, a case, which apparently makes most for the plaintiff. I refer to *Hart v. Basset*, Sir T. Jones, 156. There the plaintiff, a farmer of tithes, was prevented by the defendant's obstruction from carrying them home, and the obstruction must have been attended with considerable loss to the plaintiff The plaintiff then in that case, was obliged, in consequence of the obstruction to spend extra money in the discharge of his lawful

⁽¹⁾ *L. R., II Ex.*, 316,

⁽²⁾ 34, *L. J., Q. B.*, 257.

"calling. That, therefore, was clearly a case where there was "peculiar pecuniary damage suffered personally by the plaintiff upon the authorities I am of opinion that the "true principle is that he only can maintain an action for an "obstruction who has sustained some damage peculiar to himself, "his trade or calling, a mere passer by cannot do so, nor can a "person who thinks fit to go and remove the obstruction."

The case before their Lordships, in which they held that particular damage had not been established, was obstruction to a footway, which the plaintiff had used either for the purpose of taking a walk or of going to see his friends at a certain place, or otherwise for pleasure or profit. He did not allege that the obstruction interfered with his use of his property and he suffered no damage beyond being forced in common with all other persons attempting to use the path either to re-trace his steps and pursue his journey by another road, or else to remove the obstructions.

The case is clearly distinguishable from the present case, the *tavela*, being property, the value of which has been diminished by the obstruction, access thereto being necessary for the profitable enjoyment thereof.

In *Siddeswara v. Krishna* ⁽¹⁾, cited by counsel for the appellant, there was no averment in the plaint that, by deprivation of the use of a well in suit, the beneficial enjoyment of the plaintiff's house was materially interfered with or its value lowered.

Counsel for the respondent cites:—*Fattehyab Khan v. Muhammad Yusuf* ⁽²⁾, and *G. I. P. Railway Company v. Nowroji Pestanji* ⁽³⁾.

In (1) Edge, C. J. said: "In my opinion the courtyard was "a public place only in the sense that it was the courtyard of the "persons who dwelt in the *mohall*. As I read the judgment of "the lower Appellate Court there is not here what is known as "a public right of way It was more like a place over "which certain persons had a right of way as appurtenant to their "dwellings. There is nothing in the law to prevent a Civil "action being brought in respect of an interference with a private easement."

In (2) Sargent, C. J., "held, that the plaintiff was entitled to an "injunction on the finding of the lower Appellate Court that he had "suffered serious damage special to himself as owner of a bungalow,

⁽¹⁾ *I. L. R.*, XIV *Mad.*, 177.

⁽²⁾ *I. L. R.*, IX *All.*, 434.

⁽³⁾ *I. L. R.*, X *Bom.*, 390.

“access to which during the monsoon was practically cut off by the
“removal of a level crossing by the Railway Company.”

On the facts and the authorities the respondent was in my opinion entitled to the injunction decreed by the lower Appellate Court even if it be held that the way was a public road. There is no municipality in the village in which the way in suit is situate, and I am not satisfied that there was what is known to the law as a public road, but in my view of the law and the other facts, I see no reason for remanding an issue on this point.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 65.

Before Mr. Justice Harris.

HONDA,—(DEFENDANT),—APPELLANT,

Versus

BHAKHU AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Civil Appeal No. 158 of 1898.

Adverse possession—Joint owners, landlord and tenant—Non-payment of rent—Burden of proof—Limitation Act, 1877, Schedule II, Article 142.

The plaintiffs as proprietors sued for the possession of half the area of three wells in which the defendant who was owner of the other half share was occupancy tenant. The land having been washed away by the action of the river re-appeared in 1880. Since then the defendant got himself recorded as proprietor of the whole of the land and had paid no produce to the plaintiffs although there had been some partial cultivation by his tenants. The defendant resisted the claim and raised a plea of adverse possession for more than twelve years.

Held, that although the defendant got his name recorded as proprietor of land, of which he was only occupancy tenant, there was nothing to show that plaintiffs were aware of the entry, and the fact of the defendants being owner of the other half of the land would afford no notice of an adverse claim, there being no alteration in the apparent character of the defendant's possession from which plaintiffs could become aware that defendant had set up a proprietary title, and also it was uncertain when his possession commenced to be adverse, that being so the burden of proof was on the defendant to prove a proprietary title by adverse possession which he had failed to discharge.

Ram Chander Singh v. Madho Kumari ⁽¹⁾, *Tota v. Sokotia* ⁽²⁾, and *Tulsi Ram v. Jhandu* ⁽³⁾, followed, *Mohima Chunder Mozoomdar v. Mohesh Chunder Neoghi* ⁽⁴⁾, *Jafar Hussain v. Mashug Ali* ⁽⁵⁾, *Faki Abdulla v. Babaji Gungaji* ⁽⁶⁾, and *Alima v. Kutti* ⁽⁷⁾, referred to.

⁽¹⁾ *I. L. R.*, XII Cal., 484.

⁽²⁾ 18, *P. R.*, 1888.

⁽³⁾ 186, *P. R.*, 1888.

⁽⁴⁾ *I. L. R.*, XVI Cal., 473.

⁽⁵⁾ *I. L. R.*, XIV All., 193.

⁽⁶⁾ *I. L. R.*, XIV Bom., 458.

⁽⁷⁾ *I. L. R.*, XIV Mad., 96.

Further appeal from the decree of T. J. Kennedy, Esquire, Divisional Judge, Mooltan Division, dated 8th November 1897.

Sham Lal, for appellant.

Clark, for respondents.

The following judgment was delivered by the learned Judge:—

HARRIS, J.—The question for determination in this further 30th Jan'y. 1901.
appeal is whether the defendant, Honda Ram, has succeeded in establishing a title as proprietor of the land in suit by adverse possession. On that point the Courts below have differed, though agreed upon the main facts of the case.

The land in suit is half the area of three wells, on which half defendant was occupancy tenant and plaintiffs were proprietors, defendant being proprietor of the other half by an *adhlapi* arrangement. Defendant according to the records had to pay a small share of the produce to the proprietors. The land was washed away by river action, and re-appeared in *Sambat* 1937 (1880-81 A. D.). All the land re-appeared in that year and respondents' counsel is under a misapprehension, arising from his confusing *bighas* with *kanals* in urging that as the re-appearance was only partial in *Sambat* 1937.

Since re-appearance defendant has certainly paid no produce to plaintiffs. He was recorded as proprietor of the whole land. There is some evidence that Kadir Bakhsh, one of the plaintiffs, cultivated a small portion of this land in *Sambat* 1944-45 but it cannot be held that he paid rent to defendant though in view of defendant being entered as proprietor Kadir Bakhsh was necessarily entered as tenant-at-will. The Revenue Records show that from *Sambat* 1937 onwards there has been partial cultivation of the land by tenants of defendant.

Respondents' counsel has urged that defendant's possession was that of a co-sharer and so not adverse in the absence of express notice that he was holding adversely.

The case, however, is really one of a tenant setting up a title adverse to his landlord, though the argument that there must be some distinct claim of which the landlord is aware is applicable. *Ram Chunder Singh v. Matho Kumari* ⁽¹⁾, *Tota v. Sokotia* ⁽²⁾, and *Tulsi Ram and others v. Jhandu and others* ⁽³⁾. In this case it cannot be presumed that plaintiffs had notice of defendant's claim to be proprietor when the land re-appeared.

⁽¹⁾ *I. L. R.*, XII *Calc.*, 484. ⁽²⁾ 18, *P. R.*, 1888.

⁽³⁾ 186, *P. R.*, 1888.

The fact that defendant got his name recorded as proprietor of land of which he was only occupancy tenant is in itself suspicious. There is nothing to show that plaintiffs were aware of that entry. Defendant would as occupancy tenant naturally arrange for the cultivation, and it is fairly urged here that as the area cultivated after re-appearance was, at least at first, very limited, the fact of not paying a small fraction of the produce, especially where the part cultivated could be considered as out of defendant's half proprietorship, would afford no notice of an adverse claim. There was thus no alteration in the apparent character of the defendant's possession, from which plaintiffs could become aware that defendant had set up a proprietary title to the half of the land over which he had only been occupancy tenant.

Under these circumstances, I am of opinion that defendant's possession did not commence to be adverse in *Sambat* 1937, and that it is uncertain when such possession commenced to be adverse, and I consider he has failed to prove a proprietary title by adverse possession of the land in suit.

Several rulings (*Mohini Chunder Mozoomdar v. Mohesh Chunder Neoghi* ⁽¹⁾, *Jafar Husain v. Mashuq Ali* ⁽²⁾, *Faki Abdulla v. Babuji Gungaji* ⁽³⁾, and *Alima v. Kutti* ⁽⁴⁾), have been cited by defendant's counsel to show that plaintiffs being out of possession should prove their claim to be within time. The case, however, as indicated above, is of a peculiar nature and is not one in which plaintiffs should be called upon to prove acts of proprietorship within twelve years of the institution of their suit.

I agree in the conclusion arrived at by the Divisional Judge and dismiss the appeal with costs.

Appeal dismissed.

No. 66.

Before Mr. Justice Clark, Chief Judge, and Mr. Justice Harris.

HASHMAT AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

DULLA AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 1378 of 1898.

Regulation XI of 1825, Section 4—Alluvion—Title to land acquired by accretion—Identification of site.

Where upon the facts it was found that a certain area which was some 30 years ago submerged in the river and which had recently emerged owing

⁽¹⁾ *I. L. R.*, XVI *Cal.*, 473.

⁽²⁾ *I. L. R.*, XIV *All.*, 193.

⁽³⁾ *I. L. R.*, XIV *Bom.*, 458.

⁽⁴⁾ *I. L. R.*, XIV *Mad.*, 96.

to the recession of the river, and which had mainly if not entirely re-appeared in one year and was identifiable *in situ* as the tract of land which belonged to the plaintiffs.

Held, that the re-appearance not being a gradual accession within the meaning of the 1st clause of Section 4 of Regulation XI of 1825, and the land being identifiable *in situ* the plaintiffs who owned it prior to its submersion were entitled to its possession under the fifth clause of that section on the general principles of equity and justice.

Lopez v. Maddan Mohan Thakoor ⁽¹⁾ and *Chunder Bhan v. Ahmad Yar Khan* ⁽²⁾ followed. *Pebi Baksh Singh v. Tirbhawan Singh* ⁽³⁾ explained.

Further appeal from the decree of D. C. Johnstone, Esquire, Additional Divisional Judge, Ferozepore Division, dated 16th August 1898.

Ishar Das, for appellants.

Ganpat Rai, for respondents.

The judgment of the Court was delivered by

HARRIS, J.—The material facts are stated in the judgments 13th Feby. 1901. of the Courts below, and need not here be all repeated.

Plaintiffs claim possession of 2,471 *kanals* 13 *marlas* of land as part of the area of village Hamidwala of which they are proprietors, that whole area having been submerged in the Sutlej River and on recent re-appearance taken possession of by defendants who are proprietors of the adjacent village Baghuwala. Defendants while admitting that the land in suit originally formed part of the Hamidwala area, opposed the claim on the ground that it came to their village area by gradual accession, and that plaintiffs had lost all title to the land.

The first Court decreed the claim, but the Divisional Judge held, in the absence of proof of definite local usage, that as the land was gained by defendants by gradual accession within the meaning of clause 1 of Section 4 of Regulation XI of 1825, defendants were entitled to retain possession, though the site was identical with that of part of the original Hamidwala area. As there is no proof, and no argument has been addressed to us as to the existence of local usage, all we have to decide in this further appeal is whether the land in suit was "gained by gradual accession" within the meaning of Section 4, clause 1, of the above mentioned Regulation. For if it was not, then we are of opinion that under clause 5 of the same section equity and justice demand a restoration to plaintiffs.

⁽¹⁾ 5 *Beng. L. R.*, 521.

⁽²⁾ 36, *P. R.*, 1898.

⁽³⁾ 1. *L. R.*, XIX *All.*, 238.

The authorities do not appear to have been all before the Divisional Judge, who thus omitted to consult the Privy Council rulings reported in *Lopez v. Maddan Mohan Thakoor* ⁽¹⁾ and *Chunder Bhan and others v. Ahmad Yar Khan and others* ⁽²⁾, both of which are subsequent to most, and the latter to all, of the rulings cited in the judgment of the Divisional Judge.

It is true that the learned Judges in *Debi Bakhsh Singh v. Tirbhawan Singh* ⁽³⁾, found on the facts before them that the Privy Council ruling was distinguishable as being one clearly not of gradual accession, but they did not profess to depart from the principles on which that ruling was based, and which were followed in *Chunder Bhan and others v. Ahmad Yar Khan and others* ⁽²⁾.

The facts of this case are thus stated by the Divisional Judge:—“Some 30 years ago the village of Hamidwala, the property of the plaintiffs, was submerged by the river Sutlej. A portion of it re-appeared on the opposite (Lahore) bank later, apparently in an identifiable state, and it was taken possession of by plaintiffs, but it was again wholly submerged. The village of Hamidwala was between defendants' village Baghuwala and the river in old times, and when it was submerged 30 years ago, a portion of Baghuwala was also submerged. During the last few years the river has been receding from Baghuwala, and gradually the area of that village was made up to it by the land thrown up, and now by the gradual recession of the stream, the area now sued for has been thrown up also. This area as a mere matter of situation is part of the old Hamidwala area.”

It appears, however, from the evidence that it was in 1893-94 that the old Hamidwala site commenced to emerge owing to the recession of the river, and that it was mainly, if not entirely in that year that the area in suit re-appeared. We cannot consider that re-appearance to be a “gradual accession” within the meaning of the Regulation, and as interpreted by the Privy Council ruling (at page 525) which seems to contemplate a “gradual accession” as an acquisition “by gradual, slow and imperceptible means,” as in English Law. The Divisional Judge appears to have misread the Allahabad ruling in saying that “it was held that clause 1 of Section 4 of the Regulation does not apply to infinitesimal accretions, but to substantial accretion,” for the facts therein found were that over a series of years there was a gradual encroachment by the river upon plaintiffs' land and a corresponding gradual throwing up of land on the defendants' side

⁽¹⁾ 5, Beng. L.R., 521.

⁽²⁾ 36, P. R., 1898.

⁽³⁾ I. L. R., XIX All., 238.

of the river, facts which are also not at all on all fours with the present case.

On the other hand, the facts in the present case correspond very closely with those in the Privy Council ruling and also with those in *Chunder Bhan v. Ahmad Yar Khan* ⁽¹⁾. There has been no gradual accession, the site is identifiable and "the site is the property, and the law knows no difference between a site covered by water and a site covered by crops provided the ownership of the site be ascertained."

For the above reasons, and in accordance with the general principles of equity, the application of which is expressly directed in the fifth clause of Section 4 of the Regulation, we hold that plaintiffs are entitled to the land in suit, and setting aside the order of the Divisional Court dismissing the claim, we restore the decree of the first Court. Defendants-respondents will bear all costs throughout the litigation.

Appeal allowed.

No. 67.

Before Mr. Justice Harris.

MUHAMMAD DIN AND OTHERS,—(DEFENDANTS),—
APPELLANTS,

Versus

SADAR DIN AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 50 of 1898.

Custom—Adoption—Gift to daughter's son—Kathana Gujars of the Gujrat tahsil—Limitation—Limitation Act, 1877, Schedule II, Article 118—Suit to declare an adoption invalid.

In a case the parties to which were Kathana Gujars of the Gujrat tahsil, found that an adoption of a daughter's son or a gift of ancestral land to such a person by a sonless proprietor without consent of collaterals was invalid by custom.

Article 118 of the second schedule of the Limitation Act of 1877 is not applicable, where the adopter has no inherent power to adopt.

Bhagat Ram v. Tulsi Ram ⁽²⁾ followed; *Jogadamba Chowdhurani v. Dekhina Moham* ⁽³⁾ distinguished; *Gul Ahmed v. Sahibzada* ⁽⁴⁾ doubted; *Ilam Din v. Mubarak* ⁽⁵⁾, *Gaman v. Nadir Din* ⁽⁶⁾, *Nur Din v. Sahibzada* ⁽⁷⁾, *Fazla v. Fazla* ⁽⁸⁾, and *Muhammad v. Sharf Din* ⁽⁹⁾, referred to.

⁽¹⁾ 36, P. R., 1898.

⁽²⁾ 140, P. R., 1893.

⁽³⁾ 144, P. R., 1892.

⁽⁴⁾ 35, P. R., 1896.

⁽⁵⁾ I. L. R., XIII Calc., 308 P. C.

⁽⁶⁾ 18, P. R., 1880.

⁽⁷⁾ 45, P. R., 1881.

⁽⁸⁾ 53, P. R., 1889.

⁽⁹⁾ 8, P. R., 1891.

Further appeal from the decree of Sardar Gur Dyal Singh, Man, Additional Divisional Judge, Jhelum Division, dated 25th November 1897.

The judgment of the learned Judge was as follows:—

28th Feby. 1901. HARRIS, J.—A return has been made to this Court's order of remand of the 29th March 1900.

The findings, to which no written objections have been filed, are that the land in suit is ancestral of parties, that Muhammad Din was adopted validly by Chaughatta in 1870, that the gift is valid, and the claim is time barred.

Parties are Kathana Gujars of the Gujrat tahsil.

I have already concurred with the finding of both Courts below, that Muhammad Din's father, Karm Dad, was not Chaughatta's resident son-in-law.

There can be no doubt as to Chaughatta's intention to appoint Muhammad Din, his daughter's son, as his heir. A deed of adoption was registered in 1870 and there is evidence of subsequent treatment. Chaughatta sought to perfect the adoption by mutating his land in favour of Muhammad Din a few months before suit.

There can, I consider, be no doubt that even if adoption is recognised at all among Muhammadan Gujars of the Gujrat District the adoption of a daughter's son without consent of collaterals is invalid. The same view must be taken as to the gift to a daughter's son. It has also been held by this Court that adoption *so nomine* is not recognised by the Muhammadan tribes of the Gujrat District, and that the *Rewaj-i-am* expresses the correct view of custom in that matter. *Ilam Din and others v. Mubarak and another* ⁽¹⁾ followed in *Gaman and another v. Nadir Din* ⁽²⁾. As to the invalidity of gift *Gul Ahmed v. Sahibzada* ⁽³⁾ appears of doubtful authority, and is opposed to *Nur Din v. Sahibzada* ⁽⁴⁾, *Fazla v. Fazla* ⁽⁵⁾, *Muhammad v. Sharf-ud-din* ⁽⁶⁾, and *Gaman v. Nadir Din* ⁽⁷⁾.

The rulings of 1889 and 1891 above cited are instances of gifts by Kathana Gujars of the Gujrat District. Other rulings cited in *Gaman v. Nadir Din* ⁽⁷⁾ are to the same effect.

The Courts below have found for the validity of the adoption and of the gift on the most meagre materials, and practically those

⁽¹⁾ 140, P. R., 1893.

⁽⁴⁾ 18, P. R., 1880.

⁽²⁾ 35, P. R., 1896.

⁽⁵⁾ 53, P. R., 1889.

⁽³⁾ 45, P. R., 1881.

⁽⁶⁾ 8, P. R., 1891.

⁽⁷⁾ 35, P. R., 1896.

Courts have referred to no precedents. I have no hesitation in finding the adoption and the gift invalid by custom.

The only question which remains is whether plaintiffs can after this lapse of time dispute the validity of the adoption. I think that notwithstanding the registration of a deed there cannot be said to have been a formal adoption.

The mere registration of a deed would ordinarily be insufficient to constitute a valid adoption and would have to be perfected by other acts, and *Bhagat Ram v. Tulsi Ram* (1) is an authority for holding Article 118 of the Limitation Act of 1877 inapplicable where the transaction is by a person who, as here, has no inherent power to adopt. Hence it would seem that the principle laid down by the Privy Council in *Jagadamba Chowdhurani and others v. Dakhina Mohun and others* (2) is not applicable to the present case, and that the suit, which was for a declaration that the mutation by Chaughatta effected shortly before suit will not affect the reversionary rights of the plaintiffs, is within time.

For the above reasons I uphold the decree of the Divisional Judge and dismiss the appeal. Under the circumstances of the case I order parties to bear their own costs throughout, having regard to the fact that Muhammad Din has been residing with Chaughatta for some years, and the deed was registered in 1870.

Appeal dismissed.

No. 68.

Before Mr. Justice Chatterji.

SULTAN HABIB-ULLA KHAN,—(PLAINTIFF),—PETITIONER,

Versus

MOHABAT KHAN AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

REVISION SIDE.

Civil Revision No. 1368 of 1900.

Res-judicata—Civil Procedure Code, 1882, Section 13—Competency of Court to try subsequent suit.

In order to make a matter *res-judicata* concurrency of jurisdiction is essential. Where the former suit was exclusively triable by a Revenue Court and for the proper trial of such a suit that Court had to decide incidentally every point including that of the subject matter of the present suit, the decision of that Court, it not being a Court of jurisdiction competent to try the present suit, was not binding on the Civil Court, and the present suit was not barred by the rule of *res-judicata*.

(1) 144, P. R., 1892.

(2) I. L. R., XIII, Cal., 208, P. C.

Musammatt Edun v. Musammatt Bechun ⁽¹⁾ and *Ran Bahadur Singh v. Luchu Kocr* ⁽²⁾, followed.

Petition for revision of the decree of Major E. Inglis, Divisional Judge, Peshawar Division, dated 25th July 1905.

Gurchurn Singh, for petitioner.

A. L. Roy, for respondents.

The judgment of the learned Judge was as follows:—

11th March 1901.

CHATTERJI, J.—The material facts are briefly these. Jamma, an occupancy tenant, mortgaged some land held by him in occupancy right to the plaintiff. The proprietors, who are now defendants, sued to set aside that alienation, and their ownership of the land was denied by the plaintiff, then defendant. The Court found the issue in favour of the then plaintiffs and decreed their claim. Plaintiff now sues in the Civil Court for a declaration that field No. 237 is his property, and does not belong to the defendants. The plea is that the issue as to ownership is *res-judicata* under the decision of the Revenue Court in the former case. Plaintiff attempted to allege that the present number was not then in dispute, but this has been found against him. Both Courts also hold the claim to be *res-judicata*, and have dismissed it.

In my opinion this view is erroneous. It is not disputed that the present suit has been rightly lodged in the Civil Court, and it is not contended that the Revenue Court has jurisdiction to hear it. The former suit, to set aside an alienation by an occupancy tenant, was exclusively triable by the Revenue Court under Section 77 (3), clause (h) of the Punjab Tenancy Act, for the proper trial of such a suit the Court had to decide incidentally every point, *e.g.*, that relating to the right of ownership of the then plaintiffs in the disputed land which was challenged, which required to be disposed of before the main question before the Court could be taken up, but the decision on such a point is not binding on the Civil Court unless the Revenue Court is held to have been competent to try the present suit also. The Courts below appear to have lost sight altogether of the words “in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised” in Section 13 of the Code of Civil Procedure, or they could not have fallen into the mistake of treating the present claim as *res-judicata* under the decision of the Revenue Court. The point was ruled in several cases before the enactment of Section 13 of Act XIV of 1882—see *Musammatt Edun*

(1) 8, W. R., 175 (F. B.). (2) I. L. R., XI Cal., 301 (P. C.).

v. Mussammal Bechun (1), where it was exhaustively discussed by Sir Barnes Peacock in a learned judgment which was approved by their Lordships of the Privy Council in *Run Bahadur Singh v. Lucho Koer* (2). It is unnecessary to say more or to refer to other authorities as the wording of Section 13 leaves no room for discussion.

I accept the appeal, and set aside the decree of the Divisional Judge, and return the case to his Court for a fresh decision on the merits. Court-fee on the petition of appeal to be refunded. Other costs to abide the event.

Appeal allowed. Cause remanded.

No. 69.

Before Mr. Justice Robertson.

TAGGA,—(DEFENDANT),—APPELLANT,

Versus

ALLAH BAKHSI,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 1266 of 1900.

Custom—Pre-emption—Mohalla Kazianwala, Dera Ismail Khan—Burden of proof.

Found, that plaintiff has failed to prove the existence of a custom of pre-emption in Mohalla Kazianwala, Dera Ismail Khan.

In suits for pre-emption in respect of property situate in a town, where the custom is not universal, it is necessary for the plaintiff to prove that it exists in the particular Mohalla in question or throughout some larger area of which it forms a part.

Further appeal from the decree of Major E. Inglis, Divisional Judge, Derajat Division, dated 11th May 1900.

Ram Bhaj Datt, for appellant.

Ram Chandra, for respondent.

The judgment of the learned Judge was as follows :

ROBERTSON, J.—The question for decision in this appeal is **15th March 1901.**
“Does the custom of pre-emption prevail in Mohalla Kazianwala of Dera Ismail Khan?”

“If it be held that Kazianwala Mohalla constitutes a separate subdivision of Dera Ismail Khan, it could not well be held that the custom of pre-emption is proved to exist there, for it is clear that the custom of pre-emption has not been shown to prevail over the whole city of Dera Ismail Khan, though it may prevail in parts, and there is no presumption in favour of such a custom, the existence

(1) *W. R.*, 175 (F. B.).

(2) *I. L. R.*, XI Cal., 301 (P. C.).

of which has to be clearly proved. It has been distinctly held, for instance, that no custom exists in *Mohalla Kazianwala* in the case of *Sahib Dad v. Allah Bakhsh* (Divisional Judge Appeal No. 632 of 1898) so that at any rate the custom is not universal in Dera Ismail Khan, and it is necessary to prove that it exists in *Mohalla Kazianwala*, or accepting the joint finding that *Mohalla Kazianwala* is not a separate subdivision, throughout some larger area of which the *Mohalla* in question forms a part. It lay upon the plaintiffs to prove that the custom does exist in *Mohalla Kazianwala*, whether a separate subdivision or not. Has he done so?

The judgment mainly relied on in the first instance, in the case of *Tikaya Ram v. Parem Singh* ⁽¹⁾ has been reversed by this Court, and cannot therefore be quoted in plaintiff's favour though it only goes on so far as to decide that the custom does not exist as regards shops in Chota Bazaar.

As regards the evidence in favour of the custom, it consists mainly of a certain number of recorded cases. In most of these the right was either admitted or the case compromised, and they are therefore of much less value than they would otherwise have been. There has never been any clear authoritative ruling that the right exists all over Dera Ismail Khan, and the presumption is rather the other way.

The burden of proof lay on the plaintiff, and after examining the evidence and instances quoted I am of opinion that he has failed to discharge the *onus*, and has not proved that the right of pre-emption exists in *Mohalla Kazianwala* of the Dera Ismail Khan District. The appeal is accepted, and the plaintiff's suit dismissed with costs throughout.

Appeal allowed.

No. 70.

Before Mr. Justice Harris.

JUMMA AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

MUBARIK AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 406 of 1900.

Custom—Adoption—Gift—Kathana Gujars of the Jhelum tahsil.

In a suit the parties to which were Kathana Gujars of the Jhelum tahsil, found that adoption is not recognized in that tribe, and that a gift of ancestral land by a widow in favour of one reversioner in presence of other reversioners of equal degree is invalid.

⁽¹⁾ Unpublished Civil Appeal No. 685 of 1898.

Ilam Din and others v. Mubarak and another ⁽¹⁾, *Gaman and another v. Nadir Din and others* ⁽²⁾, *Sahib Din and others v. Amira and others* ⁽³⁾, and *Muhammad and others v. Sharf-ud-din and others* ⁽⁴⁾, referred to.

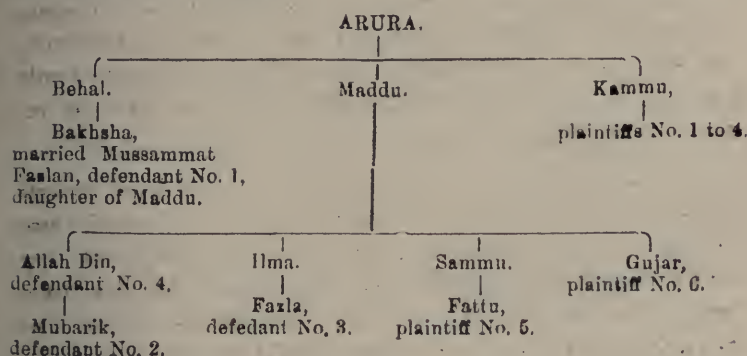
Further appeal from the decree of *Kazi Muhammad Aslam, C.M.G.*,
Divisional Judge, Jhelum Division, dated 13th March 1900.

Dhanraj Shah, for appellants.

Gurecharan Singh, for respondents.

The judgment of the learned Judge was as follows:—

HARRIS, J.—Parties are Kathana Gujars of the Jhelum 16th March 1901. *tahsil* and are thus related :



Allah Din, defendant No. 4, has another son. Bakhsha died childless in May 1897, shortly after he had, according to defendants, executed a document, dated 30th April 1897, in the form of a will whereunder his widow was to have a life tenure of his land, and thereafter Mubarik, defendant No. 2, as adopted son, and in lieu of services rendered, was to succeed.

In 1899 the widow attempted mutation of the whole of Bakhsha's estate in favour of Mubarik who is her brother's son, but on Kammu's branch objecting the Revenue authorities only mutated the share of Maddu's branch.

Plaintiffs sued as reversioners for a declaration that the above will and gift will not affect their rights.

Both Courts found the land to be ancestral of parties, and I have no doubt as to the correctness of that finding. As to the execution of the will, I think the Divisional Judge is right in considering the evidence sufficient to establish that. That exception could be taken to one witness alleged to have been present at execution, was no ground for rejecting the evidence of the marginal witnesses and the writer of the document. It was under

(1) 140, P. R., 1893.

(3) 16, P. R., 1889.

(2) 35, P. R., 1896.

(4) 88, P. R., 1891.

the circumstances natural that Bakhsha should wish Mubarik to receive some return for looking after his property, which the evidence shows Mubarik did for some years.

We are not much concerned with the fact of adoption, as the concurrent finding of the Courts below that adoption in this tribe is not recognized is undoubtedly the correct finding. As far as I am aware the tribe of Kathana Gujars is most numerous in the Gujrat District where, as represented in the *Riv ij-i-am*, adoption is not recognized by that tribe, a view which has been adopted in *Ilam Din and others v. Mubarak and another* ⁽¹⁾ and in *Gaman and another v. Nadir Din and others* ⁽²⁾.

But I may remark that there is no sufficient evidence either of formal adoption or of appointment prior to the expression of the would-be-testators wishes in the will, the mere fact that Mubarik had managed Bakhsha's property for some years being otherwise explainable.

The cause, however, turns upon the alleged special circumstances. Bakhsha had under ordinary circumstances no power to will the whole of his ancestral land to one collateral in presence of others as nearly related. *Sahib Din and others v. Amira and others* ⁽³⁾ is not on all-fours with the present case unless, as is here urged, services may be taken to represent consideration for the alienation. In *Muhammad and others v. Sharf-ud-din and others* ⁽⁴⁾ a Khathana Gujar was held not entitled by custom to gift to one nephew in the presence of other nephews, a case which is directly in point.

The Divisional Judge in dismissing the claim says, "I would not have upheld the will if the long association of Mubarik and his adoption by Bakhsha and the services rendered by Mubarik to Bakhsha during his long illness, and his being as near a reversioner of Bakhsha as any of the plaintiffs had not made me view his case with favour. Under the circumstances, I think it would be just to uphold the will as valid by custom."

There is no evidence worthy of the name that the will is valid by custom.

The *Riv ij-i-am* is presumably, as in the Gujrat District, silent about wills, and such a will is opposed to Muhammadan law. The Divisional Judge too has lost sight of the fact that the widow in making over the land as a gift is not following the terms of the will.

⁽¹⁾ 140, P. R., 1893.

⁽²⁾ 35, P. R., 1896.

⁽³⁾ 16, P. R., 1889.

⁽⁴⁾ 8, P. R., 1891.

The fact that the Divisional Judge views the defendants' case with favour does not establish custom or alter law. I see no reason why Mubarik should be favoured at the expense of other heirs, as the services rendered are, I think, not sufficient to constitute consideration. That Allah Din states he intends to leave his land away from Mubarik and to his other son does not alter the case.

The gift by the widow was clearly invalid.

For the above reasons, I set aside the order of the Divisional Court and restore the decree of the first Court. Defendants will pay all costs throughout.

Appeal allowed.

No. 71.

Before Mr. Justice Chatterji and Mr. Justice Maude.

GUJAR SINGH AND ANOTHER,—(PLAINTIFFS),—
APPELLANTS,

Versus

PURAN,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 661 of 1898.

Suit by a reversioner for possession of immovable property—Defendant in possession under an alleged adoption—Limitation—Limitation Act, 1877, Schedule II, Articles 118, 141.

A suit by a reversioner to recover possession of immovable property in the hands of a defendant under an alleged adoption, if not brought within the period prescribed in Article 118 of the Limitation Act, held barred.

Shrinivas Murar v. Hanwant Chhao Deshapande and others ⁽¹⁾, *Malkarjun Bin Shidramappa Pasare v. Narhari Bin Shivappa and another* ⁽²⁾, and *Jagadamba Chaothrani v. Dakhina Mohun Roy, Chaothrani* ⁽³⁾, followed.

Further appeal from the decree of Captain C. S. Martindale, Divisional Judge, Hoshiarpur Division, dated 27th April 1898.

Lajpat Rai and Sohan Lal, for appellants.

Dhanraj Shah, for respondent.

The judgment of the Court was delivered by

CHATTERJI, J.—The material facts are set forth in the judgments of the lower Courts and need not be recapitulated here.

The main points for decision in this appeal are :—

1. Whether the deceased Ram Singh was validly adopted by Ganda Singh whose property is claimed by the plaintiffs-appellants.

⁽¹⁾ *I. L. R.*, XXIV Bom, 260. ⁽²⁾ *V. Calc.*, W. N., 10.

⁽³⁾ *I. L. R.*, XIII Calc., 308.

2. Whether the claim is within limitation.

We have heard counsel for the appellants at length, and are of opinion that both points must be decided against them. We have not, therefore, called on respondent's counsel to reply.

There is no doubt in our minds that Ram Singh was adopted by Ganda Singh. The latter wrote a deed on 23rd November 1887, which was duly registered, and by which the land in dispute was gifted to Ram Singh. He died about four months afterwards, and the land was then mutated in the name of the donee. Plaintiffs objected and, according to the Divisional Judge, claimed to be heirs along with Ram Singh, but were referred to the Civil Court. It is argued that the mutation file does not bear out this statement in the lower Appellate Court's judgment. Though we see no cogent reason to think that the Divisional Judge has wrongly read the plaintiffs' objections, we prefer not to proceed on this ground as the mutation file is not before us. But it is not possible to blink the fact that they were told to sue in 1889, and did not do so as long as Ram Singh lived, but made their claim after his death, and the re-marriage of his widow when they found that they had only a helpless infant like the respondent to oppose them. There is no reasonable explanation of their having waited about nine years after the mutation order, in order to bring their suit. The direct evidence as to Ram Singh's adoption as well as to his having been the son of Dulla is not strong, but it is very probable that he was treated by Ganda Singh as his adopted son before and after the execution of the deed, and that the recitals of the deed are substantially correct. Had this not been the case the plaintiffs would not have remained silent so long. Moreover it is established that Ghanaya Singh, one of the plaintiffs, in 1895 sued the respondent as grandson of Ganda Singh for possession of some land which had been mortgaged by Ganda Singh. This fact also shows that the adoption was really made and was not against custom. Against the strong adverse presumptions arising from these acts and conduct of their own plaintiffs have only to oppose oral evidence of a worthless character. We decide the first question against the appellants.

This disposes of their appeal, but it also appears to us that their claim is barred by time. The Divisional Judge following certain rulings of this Court has held that it is within limitation, but the point has been lately before a Full Bench of the Bombay High Court which has ruled that where a suit to set aside an adoption actually set up has not been brought within the time laid down in Article 118 of the Limitation Act a suit for posses-

sion is also barred. *Shrinivas Murar v. Hanwant Chaodo Deshapande and others* ⁽¹⁾. The principle of this decision has the support of their Lordships of the Privy Council who in a recent decision, *Malkarjun Bin Shidramappa Pasare v. Narhari Bin Shivappa and another* ⁽²⁾ have approved of the extension of the rule laid down in *Jagadamba Chaodhrani and another v. Dakhina Mohun Roy Chaodhri and others* ⁽³⁾ to suits brought for recovery of property sold by auction in execution of decree after the lapse of the time prescribed by Article 12 (a) of the Limitation Act. In our opinion the last authority overrides all the previous decisions to the contrary of the Chartered High Courts and this Court.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

No. 72.

Before Mr. Justice Chatterji and Mr. Justice Maule.

ABDUL GHAFUR KHAN AND OTHERS,—(DEFENDANTS),—
APPELLANTS,

Versus

ABDUL KADIR AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 1095 of 1898.

Evidence Act, 1872, Section 92—Mortgage or sale—Oral evidence to prove that an apparent sale was a mortgage—Admissibility of parol evidence to vary a written contract—Conduct of parties—Fraud or mistake.

Held, that under Section 92 of the Indian Evidence Act, 1872, oral evidence is not admissible to vary or alter the terms of a written contract in which there is no fraud or mistake and in which the parties intend to express in writing what their words import, but that evidence of acts and conduct of the parties subsequent to the deed is admissible to show that something different from the written contract was intended by them.

Balkishen Das v. Legge ⁽⁴⁾, *Muhammad Ali Hussain v. Mir Nazar Ali* ⁽⁵⁾, and *Kashee Nath Chatterji v. Chundy Charn Banerjee* ⁽⁶⁾, followed. *Bhagwan Sahai v. Bhagwan Din* ⁽⁷⁾, and *Al Ahmad v. Rahmatulla* ⁽⁸⁾, referred to. *Baksu Lakshman v. Govinda Kavji* ⁽⁹⁾, *Behari Lall Doss v. Tejnarain* ⁽¹⁰⁾, *Hem Chunder Soor, v. Kally Churn Das* ⁽¹¹⁾, *Venkatratnam v. Reddiah* ⁽¹²⁾, *Rakken v. Aldappudayan* ⁽¹³⁾, *Balkishen Das v. Legge* ⁽¹⁴⁾, *Prco Nath Shaha v. Madhu Sudan Bhuiya* ⁽¹⁵⁾, and *Govinda v. Jesha Premaji* ⁽¹⁶⁾, dissented from.

⁽¹⁾ I. L. R., XXIV Bom., 260.

⁽²⁾ 5, Calc., W. N., 10.

⁽³⁾ I. L. R., XIII Calc., 308.

⁽⁴⁾ I. L. R., XXII All., 149.

⁽⁵⁾ 5, Calc., W. N., 326.

⁽⁶⁾ 5, W. R., 68.

⁽⁷⁾ I. L. R., XII All., 387.

⁽⁸⁾ I. L. R., XIV All., 195.

⁽⁹⁾ I. L. R., IV Bom., 594.

⁽¹⁰⁾ I. L. R., X Calc., 764.

⁽¹¹⁾ I. L. R., IX Calc., 528.

⁽¹²⁾ I. L. R., XIII Mad., 495.

⁽¹³⁾ I. L. R., XVI Mad., 89.

⁽¹⁴⁾ I. L. R., XIX All., 434.

⁽¹⁵⁾ I. L. R., XXV Calc., 603.

⁽¹⁶⁾ I. L. R., VII Bom., 73.

Further appeal from the decree of Sheikh Khuda Bakhsh, Divisional Judge, Perozepore Division, dated 14th June 1898.

Beechey and D. R. Shah, for appellants.

Grey and Golak Nath, for respondents.

The facts of the case and the question of law involved sufficiently appear from the following judgment delivered by

21st March 1901. CHATTERJI, J.—On 21st August 1866 Maulvi Rukan-ud-din father of the plaintiffs, executed a deed by which a garden at Hissar belonging to him was sold out and out to the defendant. Mutation of names followed, the application by the vendor having been made through his Mukhtar on 23rd August 1866, and the latter's statement recorded on 30th August. The garden has since continued to be entered as the ownership of the vendee in the revenue records.

On 22nd February 1897 the plaintiffs brought the present suit on the allegation that the garden though ostensibly sold was really mortgaged to Ahmad Nabi Khan who had the deed drawn up in the name of the defendant, his son, then a minor. The explanation of the deed having been written in the form of a sale is stated by the plaintiffs to be that the deceased was a strict Muhammadan, and had religious scruples against paying interest. He accordingly mortgaged the garden in this manner and got an *igrahnama* from the ostensible vendee's father, Ahmad Nabi Khan, on 27th August 1866, in which it is recited that he was the real transferee and that he would give back the land to the vendor when the latter repaid Rs. 4,000, for which it had been sold to him, and forego all claim to expenses incurred on the garden and in planting trees for the sake of God (*illa muaf kar dunga*). Plaintiffs alleged that defendant refused to abide by the agreement, and that they were in consequence obliged to sue for possession on payment of Rs. 4,000. Upon the statements in the plaint the suit is one for redemption of the garden on payment of the above sum.

The defendant denied the mortgage and the genuineness of the *igrahnama* of 27th August 1866, and averred that the garden was purchased by him and not by his father, the purchase money having come from his mother, that he had held adverse possession for over twelve years, and the claim was therefore barred by time, and that he had spent Rs. 5,000 in improvements which in any case plaintiffs were bound to repay before they could get back the property. He also contended that the *igrahnama* was inadmissible in evidence as insufficiently stamped and unregistered and

took other technical objections to the suit which it is unnecessary to set out here.

The first Court, Mr. B. A. Fox, Sub-Judge of Hissar, framed six issues and found them all against the defendant, and decreed the claim on payment of Rs. 4,000. The Divisional Judge on appeal affirmed his decree.

The substance of appellants' contention before us is (1) that no evidence is admissible to show that at the time of execution of the deed of sale there was a contemporaneous oral agreement that the transaction should be treated as a mortgage; (2) that the agreement of 27th August is inadmissible in evidence, false in fact, and without consideration in any case, and therefore void; (3) that the evidence in proof of the mortgage or the agreement to resell is unreliable; (4) that the claim is barred by time; (5) that Ahmad Nabi Khan was incompetent to execute the agreement as the property belonged to the defendant in whose name the purchase took place; and (6) that in any case compensation must be paid by the plaintiffs for improvements made in the garden.

These positions were controverted by the respondent, and the points for determination in this appeal are whether they are well founded or not.

On the first question, which is an important one of law, there was a prolonged argument on both sides, and a great mass of authorities were quoted by counsel.

The cases relied on by the respondent may be divided into two classes:—(1st), Those which lay down that oral evidence is admissible, notwithstanding the provisions of Section 92 of the Evidence Act, to prove a contemporaneous oral agreement at variance with the terms of the written contract or deed between the parties where their subsequent conduct supports the former; (2nd), those which hold the written contract to be capable of variance or contradiction simply by evidence of conduct of the parties.

Baksu Lakshman v. Govinda Kavji ⁽¹⁾ may be said to be the leading authority in the first class. In that case Mr. Justice Melvill, in an able and learned judgment held, upon a comparison of the decisions of the Courts in India and those of the Court of Chancery in England, "that a party, whether plaintiff or defendant, who sets up a contemporaneous oral agreement as showing that an apparent sale was really a mortgage, shall not be permitted to start his case by offering direct parol evidence of such oral agreement; but, if it appear clearly and unmistakably, from

(1) *I. L. R., 17 Bom.*, 594.

"the conduct of the parties, that the transaction has been treated
 "by them as a mortgage, the Court will give effect to it as a
 "mortgage, and not as a sale; and thereupon if it be necessary
 "to ascertain what were the terms of the mortgage, the Court
 "will, for that purpose, allow parol evidence to be given of the
 "original oral agreement" (page 609). The principles laid down
 in this case, *viz.*, that oral evidence is not admissible in the first
 instance, but only when the substratum of a case of a parol agree-
 ment at variance with the writing is established by conduct of the
 parties, have been accepted in their entirety in the following
 decisions:—*Behari Lall Doss v. Tej Narain* ⁽¹⁾ and *Hem Chunder*
Soor v. Kally Churn Das ⁽²⁾, *Venkatratnam v. Reddiah* ⁽³⁾;
Rakken v. Alagappudayan ⁽⁴⁾, though in the last named case Mr.
 Justice Mutusami Ayyer was also inclined to hold that it was
 competent to the party alleging the contemporaneous oral agree-
 ment to start his case by giving direct proof of the same, and was
 not bound to offer indirect evidence of conduct in support of it first
 as laid down by Mr. Justice Melvill, *Balkishen Das v. Legge* ⁽⁵⁾
 may also be placed under this category.

The leading case in the second class is the Full Bench decision
 of the Calcutta High Court, *Kashee Nath Chatterjee v. Chundy*
Oharn Banerjee ⁽⁶⁾ which was passed before the enactment of
 Section 92 of the Evidence Act, and which has since been followed
 in other cases, one of the most important of which is *Preo Nath*
Shaha v. Madhu Sudan Bhuiya ⁽⁷⁾ in which the same principles are
 affirmed by another Full Bench after a review of the latter decisions.
Govinda, &c., v. Jeshu Premaji ⁽⁸⁾ also affirms the same principle.

Cutts v. Brown ⁽⁹⁾ and *Jadu Rai v. Bhobotaran Nundy* ⁽¹⁰⁾
 quoted for the respondent appear to have no bearing on the ques-
 tion before us; nor in *Jumna Das v. Srinath Roy* ⁽¹¹⁾ reported in
 a footnote under the latter case relevant to that question.

The matter came up for consideration lately before their
 Lordships of the Privy Council in *Balkishen Das v. Legge* ⁽¹²⁾ on
 appeal from the decision of the Allahabad Court already cited.
 Their Lordships dissenting from the view of the High Court held
 that oral evidence was not admissible. They said:

"Evidence of the respondent and of a person named Man was
 "admitted by the Subordinate Judge for the purpose of proving

(1) *I. L. R.*, X Cal., 764.

(2) *I. L. R.*, XXV Cal., 603; 2, Cal.,
 W. N., 562.

(3) *I. L. R.*, IX Cal., 528.

(4) *I. L. R.*, VII Bom., 73.

(5) *I. L. R.*, XIII Mad., 494.

(6) *I. L. R.*, VI Cal., 328.

(7) *I. L. R.*, XVI Mad., 80.

(8) *I. L. R.*, XVII Cal., 173.

(9) *I. L. R.*, XIX All., 434.

(10) *I. L. R.*, XVII Cal., 176.

(11) 5, W. R., 68.

(12) *I. L. R.*, XXII All., 149.

"the real intention of the parties, and such evidence was to some extent relied on in both Courts. Their Lordships do not think that oral evidence of intention was admissible for the purpose of construing the deeds or ascertaining the intention of the parties. By Section 92 of the Indian Evidence Act (Act I of 1872) no evidence of any oral agreement or statement can be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying or adding to, or subtracting from its terms, subject to the exceptions contained in the several provisos. It was conceded that this case could not be brought within any of them. The cases in the English Court of Chancery have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian Legislature. The case must, therefore, be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts," pages 158, 159.

In our opinion the doctrine laid down by Mr. Justice Melvill in *Baksu Lakshman's* case ⁽¹⁾ and the authorities which follow that judgment has been swept away by the above decision, though we do not apprehend it sets aside the rule enunciated in *Kashi Nath Chatterjee v. Chundy Churn Banerjee* ⁽²⁾. The oral evidence offered in this case as to the real intention of the parties to the deed of sale at the time of its execution, *i.e.*, the oral agreement that it was to be treated as a mortgage though drawn up as sale, is thus excluded. We may also point out that we have considerable difficulty in accepting the argument used in *Rakken v. Alagappulayan* ⁽³⁾ and some of the other authorities, that oral evidence of a contemporaneous parol agreement inconsistent with the deed is admissible on the ground that the party who insists on enforcing the terms of the latter contrary to the former is thereby guilty of a fraud. Where the deed is drawn up differently from the oral understanding without the consent of the parties to the transaction it can only be due to mistake or fraud, and Section 92 expressly saves such cases, but where the written terms have been so entered in the deed with their knowledge and consent, it is impossible to adduce proof of the different oral agreement without reducing the section to a dead letter. For it appears to us that in every case in which the oral agreement is sought to be excluded, the other side can contend that this conduct is tantamount

(1) *I. L. R.*, IV Bom., 594.

(2) 5, *W. R.*, 68.

(3) *I. L. R.*, XVI Mad., 80.

to fraud as it was necessarily understood that the oral agreement and not the deed was to be enforced. But the intention of the section is to exclude such a contention in cases where the deed is consciously written differently from the oral agreement. Sir Barnes Peacock in *Kashi Nath Chatterjee's* case, which, as already observed, was decided before Section 92 was enacted, laid down the rule, afterwards embodied in that section, in clear and forcible language. He said, "I am of opinion that verbal evidence is not "admissible to vary or alter the terms of a written contract in "cases in which there is no fraud or mistake and in which the "parties intend to express in writing what their words import." This view of Sir Barnes Peacock has now the support of the Privy Council, but as already stated we do not understand their Lordships to disapprove of the other doctrine laid down in the same judgment, viz., that evidence of acts and conduct of the parties subsequent to the deed is admissible to show that something different from the written contract was intended by them. Such evidence is not excluded by Section 92, and there is nothing in the judgment of the Privy Council which can be construed as an indication of opinion in favour of its exclusion. Our view agrees with that taken by the Calcutta High Court in *Muhammad Ali Hussain v. Mir Nazar Ali* ⁽¹⁾.

Excluding oral evidence of the contemporaneous parol mortgage and limiting ourselves to subsequent acts and conduct we find nothing to support the plaintiffs' case at all except the agreement of 27th August, the genuineness of which is disputed. The other acts of the alleged vendor were, on the contrary, calculated to show that a final transfer had taken place. The statement at mutation of names was to that effect, and the entry of the vendee's name as proprietor of the garden has ever since been acquiesced in. Before the institution of the present suit the plaintiffs or their father did nothing to show that the garden was treated as their property and the vendee on his part has done no act which can be construed to be an admission of plaintiffs' or their father's right.

Assuming for the present the genuineness of the *iqarnama* of 27th August, it is not sufficient, taken in connection with the sale deed in defendants' favour, to show or even to raise any presumption that the latter document was in reality meant to be an instrument of mortgage. It is an essential ingredient in the notion of a mortgage that there should be a debt due from the mortgagor to the mortgagee. *Bhagwan Sahai v. Bhagwan Din* ⁽²⁾. But it cannot at all be predicated from the mere existence of the two

⁽¹⁾ 5, Cal., W. N., 326.

⁽²⁾ I. L. R., XII All., 387.

documents that Rukan-ud-din on 21st August 1866 contracted a debt of Rs. 4,000 from the defendant or his father, Ahmad Nabi Khan, by reason of which the relation of debtor and creditor has continued to exist from that date to the present. If there is no loan there can be no mortgage. The only jural relation between Ahmad Nabi Khan and Rukan-ud-din that could flow from the subsequent *iqarnama* was that of intending vendor and purchaser, i.e., the former thereby contracted to sell the garden to the latter for Rs. 4,000, with certain conditions about not claiming for improvements subsequently made. Had the documents been of even date, such a construction might have been admissible as was held in *Ali Ahmad v. Rahmatullah* ⁽¹⁾ and *Bulkishen Das v. Legge* ⁽²⁾. It follows therefore that the only form in which the plaintiff could sue to recover possession of the garden under the *iqarnama* was not by way of redemption of mortgage, but of specific performance of the contract of sale embodied in that document. Plaintiff's claim, however, was for redemption, and this had been decreed. He did not sue for enforcement of the contract of sale contained in the *iqarnama*. On the above finding his suit ought to be dismissed.

We have no desire to be technical, and should be loath to throw out a claim which is substantially good on the merits and legally maintainable on a mere question of form. We should be disposed to allow an amendment, but that there are almost insuperable difficulties in permitting plaintiffs to change the nature of their suit at this stage. The pleadings would have to be taken down afresh, and the case decided on new issues. The balance of convenience is certainly not in favour of such a course. The plaintiffs have not asked for leave to amend, though the respondent in the course of the argument did put forward a number of legal objections to specific performance of the contract of sale being decreed in plaintiffs' favour. That about such a claim being barred by limitation under Article 142 or 144 of the Limitation Act does not appear to be sound as the claim would be based on a different title to that under which plaintiffs held the property before and as the Article properly applicable is 113. It is, however, urged that in cases of this kind the Court has a discretion, and this appears to be an argument of great force. The plaintiff has delayed more than thirty years in suing for the recovery of the property without any good excuse, and such laches should disentitle him to relief. The case is analogous to that of *Bhagwan Sahai v. Bhagwan Din* ⁽³⁾ decided by the Privy Council, already

(1) I L. R., XIV All., 159. (2) I. L. R., XXII All., 149.

(3) I. L. R., XII All., 387.

cited, the only difference, which tells *a fortiori* against the present claim, being that the deeds of sale and agreement to resell were contemporaneous and a term of ten years was fixed for the repurchase. Their Lordships held, reversing the concurrent findings of the High Court of Allahabad and the Subordinate Judge that no claim for redemption was sustainable on them, and that it would "seem to be" "contrary to all principles of equity and good conscience that when" "it was stipulated that the money should be repaid within the" "period of ten years from 1835, the representatives of the vendors" "could lie by until the year 1884, and then claim that they had, a" "right which was not barred by limitation to redeem that which" "they call a mortgage" Lastly, we have grave doubts of the genuineness of the agreement itself, and do not at all consider it has been satisfactorily proved by the evidence on the record in the face of the cogent reasons that exist for distrusting it.

We deem it sufficient therefore to decide the case as it has been laid, and find that plaintiff has failed to prove the mortgage for the redemption of which he sues.

We accept the appeal and reversing the decrees of the lower Courts, dismiss the plaintiff's suit with costs in all the Courts.

Appeal allowed.

No. 73.

Before Mr. Justice Robertson.

DIN MUHAMMAD,—(PLAINTIFF),—APPELLANT,

Versus

KARIM BAKHSH AND ANOTHER,—(DEFENDANTS),—
RESPONDENTS.

Civil Appeal No. 132 of 1901.

Pre-emption—Sale to a co-sharer—Suit by another co-sharer who was also a collateral of the vendor—Superior right—Custom—Punjab Laws Act, 1872, Section 12—Rica-i-am.

Held, that in mauza Patni, tahsil Jampur, Dera Ghazi Khan District, a co-sharer of a vendor, who is also his relation has a superior right of pre-emption than other co-sharers who are not relations of the vendor.

Further appeal from the decree of Lala Mul Raj, Divisional Judge, Derajot Division, dated 23rd August 1900.

Muhammad Shaffi, for appellant.

Dhanpat Rai, for respondents.

APPELLATE SIDE. }

The judgment of the learned Judge was as follows :

ROBERTSON, J.—The only question to be discussed in this 22nd March 1901. appeal is :—

Does a custom obtain in the village in question under which the collaterals of a vendor have a superior right of pre-emption to that of others who are equally co-sharers in the well to which the land sold belongs, but who are not themselves collaterals ?

The custom is not one which can be presumed to exist in the absence of any proof that it does obtain under Section 13 of the Punjab Laws Act. Under that Act, as I understand, there is an initial presumption that a right of pre-emption exists in all village communities, however constituted, and therefore it is clearly to be presumed to exist in this case ; then if no definite custom is set up and proved in absence of a custom to the contrary, the right of pre-emption would be as laid down in Section 13. The incidents of the right as laid down in Section 13 come in when the right of pre-emption has been presumed under Section 12, but no special custom set up. It does not appear to me that it is anywhere laid down that the presumption is that the custom is as in Section 13, unless no other custom has been set up or being set up has failed of proof.

In support of the custom set up here, we have first the entry in the *Riwaj-i-am*, the last clause of which in regard to pre-emption contains a special reservation in favour of the rights of collaterals which derives special force from its being a particular reservation in one special point, the general rules being accepted as regards other matters. This *Riwaj-i-am* applies to the said *ilauqa* of *tahsil* Jampur, and this reservation is specially noticed in Tupper's *Customary Law*, page 263, Volume II, and he remarks on the interesting fact that this shows the recognition of the tie of blood to the near kinsmen of the tribe as *stronger* than the civil nexus of joint ownership.

In this case the defendant and the vendee, against whom pre-emption is claimed are both joint owners in the well to which the land sold belongs—the vendee in virtue of a previous purchase. The plaintiff and the vendor are also joint owners, and also near collaterals. The *Riwaj-i-am* is in favour of the plaintiff, and though it has no statutory presumption of correctness attached to it, I am not prepared to treat it as of no weight. I think the views expressed regarding entries in a *Riwaj-i-am* in *Hashim and others v. Nathu and others* ⁽¹⁾ are those applicable to this case.

(1) 13, P. R., 1900,

The first Court dismissed the plaintiff's claim, on appeal a remand was made for a further enquiry into the custom of pre-emption prevailing in *mauza* Patni, and the return made to that remand was in favour of the custom set up by the plaintiff, but the lower Appellate Court did not agree with that view and rejected the appeal. An appeal under Section 70 has been admitted to this Court on the question of custom stated above. Claims to pre-emption on the ground of relationship to one vendor are clearly recognised in Section 12 of the Punjab Laws Act under certain circumstances, but relationship is not one of the grounds recognised in the absence of proof of the custom as existing in villages such as the one here concerned. It is however well known that rights of pre-emption on the ground of relationship have been held to exist in many cases not covered by Section 12 (a), clause (b) of the Punjab Laws Act and relationship to the vendor is very frequently put forward as conferring such a right and stands on quite a different footing from claims on more unusual and fanciful grounds, such as vicinage and the like. (Roe's *Tribal Law*, page 129, may be consulted.)

The oral evidence is mainly in favour of the existence of the custom, some even of defendants' witnesses supported it, but alone would probably be held insufficient to prove its existence. As regards judicial decisions several are produced in favour of the existence of this custom in other villages of the same *ilaga*.* These also would not be sufficient alone to prove the existence of the custom in the village in question.

When the present plaintiff sold land himself to the present defendants a suit for pre-emption was threatened and a compromise was come to, half the land attached to one well being surrendered to plaintiff but the land in the Jhugiwala well (that now in question) remained with Dewa Mal, so that it is not easy to draw any specific conclusion from that affair.

In the defence a case of *Muharik Khan v. Din Muhammad* decided on 19th August 1897, relating to this very village, was relied on. This case was decided by the Tahsildar of Jampur. Dewa Mal, defendant, and Din Muhammad, plaintiff, were both defendants in that case. In that case it was clearly decided that

* *Alla Ditta v. Hassu*, decided by Tahsildar, Jampur, 19th March 1900 (compromised).

Phallu v. Mirza, decided by Nasir Ali, Extra Judicial Assistant on 10th April 1879.

Jawal Muhammad v. Bahram, decided by Mr. Birch, District Judge, 30th January 1894.

relationship gave no right of pre-emption, but the claim was also dismissed on other grounds, and the plaintiff in that suit does not appear to have been a co-sharer in the well as well as a relation of the vendor. The question now before us does not appear to have been carefully considered. I have given this case very careful consideration, and I consider that the entry in the *Kiwaj-i-am* to which as I understand it defendant admitted himself to be "a partner" the oral evidence and the judgments in regard to other villages taken together establish that a right of pre-emption exists on the part of relations of a vendor who are also co-sharers in a well, which is superior to the right of other co-sharers in the well who are not relations of the vendor. I accordingly accept the appeal and decree the plaintiff's claim, Rs. 40, to be paid into the first Court within two months of this order. Costs against defendants throughout.

Appeal allowed.

No. 74.

Before Mr. Justice Chatterji.

SOBHA AND OTHERS,—(DEFENDANTS),—APPELLANTS,

Versus

RAM PARTAB AND ANOTHER,—(PLAINTIFFS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 216 of 1899.

Limitation—Suit on instalment bond—Limitation Act, 1877, Schedule II, Articles 74, 75.

Held, that the limitation for a suit on an instalment bond is provided for by Article 74 of the Second Schedule of the Limitation Act, 1877, unless it can be brought under Article 75, the essential requisites of which are that (1) the penalty should be attached to a single default, and (2) that the whole bond should then fall due, the absence of either of these conditions rendering that Article inapplicable.

*Miscellaneous further appeal from the decree of Rai Sri Ram,
District Judge, Jullundur, dated 29th November 1898.*

Sohan Lal, for appellants.

Durga Das, for respondents.

The judgment of the learned Judge was as follows :—

CHATTERJI, J.—The facts of this case are very simple and 23rd April 1901.
do not require recapitulation here. The point for determination is, what is the limitation applicable to the present suit, which is for the recovery of Rs. 120, being the amount of six instalments under the bond with Rs. 60 interest, Rs. 180 in all ?

The suit is within time counting it from the dates the instalments fell due, but it is contended that in consequence of the proviso as to default, Article 75 of the Limitation Act applies. The first Court held that nothing has been paid since Maghar 1946 Sambat and that in consequence of the default the whole bond fell due then and the suit is therefore barred by time under the above Article. The District Judge without going into the question of default has held that as the bond provides that in case of non-payment of ten instalments, the whole sum secured by it shall fall due, that Article has no application but Article 74.

The interpretation of the bond is one of great difficulty as the words used are so ambiguous and inartistic that the exact meaning of the provision as to default cannot be clearly ascertained. The first Court apparently held that the whole bond became payable on failure to pay one instalment. The District Judge thinks that it becomes due in case of ten instalments being in default. The logical construction of the words leads to absurdities. I do not think it is essential to ascertain the exact meaning of the whole provision for purposes of limitation, though possibly it might be of some relevancy in order to find out whether interest is claimable.

The bond is payable by instalments, and therefore either Article 74 or 75 will apply. The former is the Article of general application, and will govern the suit unless it can be brought under the second. For purposes of the latter Article it is necessary that the bond should also provide "that, if default be made in payment of "one instalment, the whole shall be due." The question is, does the bond provide this, for if it does not, Article 75 has no application?

I have set out above the views of the lower Courts. On the District Judge's interpretation his ruling as to limitation is correct. The essential requisites of Article 75 are that (1) the penalty should be attached to a single default, and (2) that the whole bond should then fall due. If the provision is defective on either point, the Article cannot apply. According to the District Judge, the second requisite exists, but the first does not, as ten defaults are necessary. So far, as I can understand the bond, my opinion is that the words "*basurat adam adai iqrar mundarji ke*" refer to the promise to pay instalments half-yearly at stated times, and, therefore, the correct interpretation is that every promise is included in the words above quoted, and even a single default falls within their purview. Thus the first requirement of Article 75 is found in the document, but I cannot construe the bond to contain any provision that the whole shall fall due in case of default, and thus

the second requisite is not found. It is true that the words about interest on ten instalments from the date of the bond are scarcely capable of rational interpretation, or of being logically worked out as they stand, but in any case, I do not think they mean ten defaults in succession or otherwise. And the word *asal* can only refer to what has gone before, *viz*, the amounts of the instalments and not of the bond as a whole.

On this view, as on that of the District Judge, Article 75 is excluded, and as the bond is payable by instalments and the special proviso contemplated in Article 75 does not exist, Article 74 should be held to apply. If this is at all doubtful, I should say Article 115 governs the suit and no other. In either case the suit is within time.

I think the District Judge was not wrong in remanding the case under Section 562, Civil Procedure Code, as the actual amount of principal and interest due ought to be decided by the lower Court, there being no finding on those points.

The appeal is dismissed with costs.

Appeal dismissed.

No. 75.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

PHUMMAN MAL,—(DEFENDANT),—APPELLANT,

Versus

KEMAN,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 1377 of 1897.

Pre-emption—Purchase money,—“Good faith”—Punjab Laws Act, 1872, Section 16, clauses (c) and (d).

The law of pre-emption though it does operate to keep down the price of property to some extent by hampering transfers is not intended to have that effect, it merely aims at protecting the prior rights of purchase of certain persons on specific grounds, and as it stands cannot be interpreted to deprive the owner of the right to make the most he can of his property, and there is nothing improper to demand or to pay a price much above the market value. Therefore in a case for pre-emption where the price entered in the deed of sale though considerably above the market value was not shown to be fictitious, and where there was no proof nor indication that any portion of it was refunded or otherwise appropriated, *held*, that the price was fixed in good faith.

Further appeal from the decree of Kazi Muhammad Aslam, C. M. G., Additional Divisional Judge, Ferozepore Division, dated 25th August 1897.

Lal Chand, for appellant.

Muhammad Shaffi, for respondent.

The facts of this case sufficiently appear from the judgment of the Chief Court delivered by

10th May 1901.

CHATTERJI, J.—In this case 603 *kanals* 11 *marlas* of land out of *khata* No. 4, in the village of Waghevala in the *tahsil* and District of Ferozepore, were sold by certain Bania proprietors to one Phumman Mal, an Arora, who owned no land there. The plaintiff, a Dogar of Khai, who is a co-proprietor in Waghevala, sued for pre-emption. The sale deed recited that the purchase money was Rs. 2,500 which were paid before the Sub-Registrar, but plaintiff alleged that only Rs. 1,250 had actually been paid. This was the only point in issue between the parties as the plaintiff's right to pre-empt was not disputed.

The first Court held that the price stated in the deed actually passed, but that it was nevertheless not fixed in good faith. The vendee had previously purchased double the quantity of land out of the same *khata* for Rs. 2,800, and was deprived of it by a suit for pre-emption. While the suit was pending, the present purchase was made, and the Court held that the vendee was evidently determined to get a footing in the village, and did not mind what he had to pay, and that though he was entitled to make a reasonably high bid for this purpose he could not purchase by offering nearly double the market price. The price though found to have been actually paid was, therefore, held not to have been fixed in good faith. Acting on the decision in the former suit, the Court found Rs. 1,400 to be the market value, and gave plaintiff a decree on payment of that sum.

The Divisional Judge upheld the decree substantially on the same grounds.

✓ The vendee appeals urging that he honestly paid Rs. 2,500, and that it does not matter that that sum exceeded the market value. He also contends that the market price is not Rs. 1,400, and that the Courts are wrong in taking as their standard the price fixed in the former deed by which the rights of a mortgagee after foreclosure were acquired. The respondent's counsel replies that the mere passing of the consideration for a sale of property subject to pre-emption, if it is much over the market price, is not sufficient to prove good faith when the object of the vendee is clear.

ly shown to be to acquire a footing in the village at any cost to the detriment of the old proprietors. He also denies that Rs. 2,500 actually passed, though this has been found by the two Courts below, and further argues that it is essential to ascertain the market price in order to properly decide the question whether the consideration money for the sale was intended to pass and did pass.

It may be mentioned here that no other sales have taken place in the village, and that the lower Courts regard instances of sales in other villages valueless as *criteria* of the actual market value of the land in dispute. Plaintiff is shown by the proceedings to be a resident of another village to which the vendee also belongs. There having been no sale in the village in recent times according to the lower Courts, it would seem that the vendors Banias are proprietors of long standing in Waghewala, which is thus not shown to be a compact Dagar village as plaintiff's counsel contended before us. In fact plaintiff though a co-sharer in it comes from another village. On the whole, therefore, no special equities appear to exist in plaintiff's favour, though he is, of course, entitled to the full benefit of the law of pre-emption.

The decision of the appeal turns practically upon the meaning of the expression "*in good faith*" used in clause (c) of Section 16 of the Punjab Laws Act, 1872. It is not defined anywhere in the Act. It is ordinarily an equivalent of the Latin phrase *bonâ fide* which has somewhat varying meanings given to it in different branches of the law, there being a common element however implied in all, *viz.*, that the act of which it is predicated was done honestly. It is an expression introduced from English Law in which it may be stated generally that the words have no technical "legal signification, but are to be taken in their ordinary acceptation, and mean simply honesty in belief, purpose or conduct." *Encyclopædia of the Laws of England*, Volume 6, page 80. See also Strond's *Judicial Dictionary*, *Titles*, *Good Faith* and *Bonâ fide*. In some cases inquiry and care is required to constitute good faith, *e.g.*, in the Indian Penal Code, Section 52.

The sense in the section under discussion appears to be "honestly," and all others are excluded. Now "honestly" applied to the fixing of the price of property sold, which is subject to pre-emption, must import this much, that the price fixed was meant to be actually paid, and was not to be a false or fictitious one in order to make out the value to be higher than the reality, and to defeat pre-emption. This was the inter-

pretation put on the expression in *Imam-ud-din, &c., v. Nur Khan, &c.* ⁽¹⁾: a case somewhat similar to the present one in regard to many of its facts. There also the findings of the lower Courts were that the price stated in the deed actually passed, but was nevertheless not fixed in good faith as the land was worthless. The Chief Court observed: "If the payment was no mere pretence "but was actually made, there being no arrangement that the "money would be handed back, or that the vendor would receive "credit for it in any other way than as a payment for the price of "the land, we think it impossible to hold that the price was not "fixed in good faith simply because the Court thinks the land worthless" (page 33).

There may be cases where the price is correctly stated in the deed, and is meant to pass as between the vendor and the vendee, but which is not fixed in good faith so far as the pre-emptor is concerned; for example, where the vendor owes the vendee large sums of money and has no other asset, and the whole amount of the debt is discharged by the transfer of the land. Here the debts being wiped out, the full consideration stated in the deed may be said to have passed, but the true consideration was not the nominal value of the debts, i.e., their arithmetical total, but their present or market value. This is an intelligible position, but here the essential distinction appears to be that the purchase money is not cash paid down but pre-existing liabilities discharged. We expressed a similar opinion in Civil Appeal No. 851 of 1893, and another Division Bench appears to have held the same view in Civil Appeal No. 585 of 1890. See also *Baldeo Das and others v. Piare Lal* ⁽²⁾.

In *Jalal-ud-din Khan v. Sandeh Khan and others* ⁽³⁾, there is a dictum to the effect that "a case might arise in which the price "fixed was so obviously a price fixed with the intent to defeat the "right of the pre-emptor and to introduce a wealthy stranger, as "to indicate a transaction amounting to a fraud against the right, "and in such a case it might very properly be held that an offer "at such a price even if it was actually paid, was not a *bona fide* "offer." The case itself was not decided on this principle though the price paid was high.

A case might arise in which the real object of the purchaser is to acquire the property in dispute, not as an investment nor for the purpose of enjoying its use, but solely because it furnishes a means of injuring and annoying an enemy. Here if a very high

⁽¹⁾ 10, P. R., 1884.

⁽²⁾ 24, P. R., 1901.

⁽³⁾ 49, P. R., 1881.

price is actually paid in order to induce the seller to part with it, it may possibly be argued with reason that the price was not fixed in good faith, i.e., honestly, as a bargain of sale, a good portion of the consideration being paid for an object that cannot be said to be honest. But the law of pre-emption, though it does operate to keep down the price of property to some extent by hampering transfers, is not intended to have that effect. It merely aims at protecting the prior rights of purchase of certain persons on specific grounds. If the rule stated in some of the old Administration papers, viz., of pre-emptors being entitled to purchase at a price fixed by the *panchayat*, had been in force, there might have been some ground for such a contention. But the principle has been departed from in the legislation on the subject, and such an element ought not in our opinion be imported into the interpretation of the provisions of the Act. The wording of clause (d), Section 16, as contrasted with that of clause (c), also appears to support this view. Under the latter clause the market value can only be gone into if the price has not been fixed in good faith, but the former contains an additional provision under which the pre-emptor can claim to acquire the property at the market value, whatever may be the amount due on the mortgage, and it is claimed in good faith. The fair inference from a comparison of the two clauses and from the other considerations above stated appears to be that the law does not intend that the pre-emptor may claim a reduction of the real price at all on the ground that it is excessive and thus militates against his right.

If this be so we are unable to see how a fraud can be perpetrated on pre-emptors by the vendee paying an excessive or a fancy price for the property sold. It is difficult to give a comprehensive definition of fraud, nor is it necessary. To use the words of Sir Fredrick Pollock it "may be described, for most usual purposes, as the procuring of advantage to oneself, or furthering some purpose of one's own by causing a person with whom one deals to act upon a false belief." *Tagore Law Lectures*, 1894, page 17. The fraud may be perpetrated upon a third party, e.g., in a sale of property subject to pre-emption where the price is fictitiously stated in order that pre-emptors might be led to believe that the money actually passed, and be dissuaded thereby from claiming to enforce their right. But the element of deception must exist in some form in the transaction. Constructive or legal frauds which arise on breach of duty on the part of a person standing in a special relationship to another may be left out of consideration in the present discussion, but even they come within the above principle more or less. Now where the price has been

actually paid or fixed, and is meant to be a payment for the property sought to be pre-empted, this element must be entirely wanting.

We have said already that the law of pre-emption as it stands at present, cannot be interpreted to deprive the owner of the right to make the most he can of his property. If this is conceded it is nothing improper to demand or to pay a price much above the market value. The vendee may have special reasons for desiring to acquire the property, and they are quite legitimate when they relate to his own convenience or comfort, or to his enjoyment of its benefits. If it is a profitable investment or enables him to acquire other property these grounds do not militate against his honesty. If the pre-emptors wish to keep him out they must pay what he is willing to pay, but they are not in any case bound to press their claim. We are unable to see therefore how the payment of a price above the market value can be held to be a fraud upon the pre-emptor's right, or to be an act of bad faith in any of the above circumstances. The only possible exception is the case where, to gratify a pre-existing grudge against a particular person who also happens to be a pre-emptor, a vendee seeks to acquire a property for the purpose of injuring and annoying him, and agrees to pay an abnormally high price. Perhaps in such a case the extra payment is not really paid for the property, but for an ulterior and improper purpose, and therefore the price named in the deed is a mere pretence, and may be said not to be fixed in good faith. At all events we do not wish our remarks to be understood as covering a case of this kind. There is, however, no allegation that the present vendee is actuated by any personal feelings against the plaintiff and therefore such a question does not arise here.

Applying the reasoning above given we are unable to hold that the price can be said not to have been fixed in good faith in this case when it cannot be shown to be fictitious. The Courts below are agreed that it is not fictitious, but actually passed. It was paid before the Sub-Registrar, and the Courts below concur in finding that the vendee has failed to show that any portion was afterwards refunded or agreed to be credited to another account between the parties. Respondent's counsel admits that it is practically impossible for his clients to prove these facts, and he does not contend that his evidence was improperly dealt with by the lower Courts, nor assert that he has other evidence to produce. The loss of the District record, therefore, does not necessitate a fresh trial of the case.

Counsel, however, contends that a large difference between the market price and that actually paid is a very material consideration for the decision of the question whether the price was fixed in good faith. The Court may pay due regard to the fact that it is not in human nature, without very strong reasons, to throw away money in this way, and this is specially true of the capitalist class to which the vendee belongs, and the Court may, therefore, draw the conclusion that the money ostensibly paid did not actually pass as the consideration for the sale, but was refunded in some shape or other : *Sheepargash Dube v. Dhanraj Dube and others* ⁽¹⁾. He also urges that the disparity between the market price, Rs. 1,400, found by the lower Courts, and that said to have been paid by the vendee, Rs. 2,500, is enormous, and cannot be accounted for on any theory of honest dealing. He further states that the land is for the most part held by occupancy tenants, and subject to alluvion and diluvion and other matters not alleged in the lower Courts, and asks that, if necessary, further inquiries might be made into the question.

The Courts below find that there have been no previous sales in the village which can be referred to as precedents, and that transfers in other villages are very unsatisfactory *criteria* of the market value. The plaintiff asserted that the actual price paid was only Rs. 1,250 which, as laid down in *Gulab and others v. Ram Singh* ⁽²⁾ may be accepted as the best proof of the market value in the absence of satisfactory evidence to the contrary. The Courts below taking the price paid in a previous sale out of the same *khata* a suit about which, at the instance of the plaintiff, was pending at the time of the present transaction, to be the real market value, fixed it at Rs. 1,400. The plaintiff accepted this finding, though the vendee has all along been contesting it. It does not appear to us necessary to make a fresh inquiry into the market value of the land under the above circumstances, as in spite of the facts relating to the property now stated for the first time, the plaintiff was content to pay Rs. 1,400 below which we could not go, and all data for drawing the inference of fact against the good faith of the vendee which the plaintiff wants us to draw already exist on the record.

The lower Courts have believed the vendee's evidence as to payment in full, disbelieved the plaintiff's evidence to the contrary, and declined to hold that the price stated in the deed did not really pass because of the disparity between it and what

⁽¹⁾ *L. L. R.*, IX All., 225.

⁽²⁾ 102, *P. R.*, 1890.

they found to be the market value. The question now is whether we should draw any such conclusion from that fact.

The whole consideration was paid before the Sub-Registrar, and there is no proof nor indication that any portion of the money was refunded, or otherwise appropriated. There is of course some suspicion that this was done, but suspicion is not proof. The vendor and vendee, though Hindus, belong to different castes, and no special connection between them is established. Both the lower Courts have refused to find that the price stated in the deed did not actually pass, and we do not see a sufficiently strong case for taking a different view. As regards the market value also, though the opinion of the lower Courts is approximately right, there is something to be said for the vendee's contention that Rs. 1,400 was fixed under different circumstances and should not be treated as conclusive in the present instance. On the whole, therefore, we are not prepared to draw the inference which plaintiff wishes us to draw from the supposed disparity between the price actually paid and the fair market value of the property in suit. It follows that the finding of the lower Courts against good faith must be reversed.

We accept the appeal and modify the decree in plaintiff's favour to the extent that plaintiff must pay Rs. 2,500 in order to acquire the disputed property. We allow plaintiff two months from the date of our decree to make up the deficiency in the price by payment into Court, failing which the suit shall stand dismissed with costs.

The parties will pay their own costs throughout.

Appeal allowed.

No. 76.

Before Mr. Justice Robertson.

MUSSAMMAT ATRI,—(PLAINTIFF),—APPELLANT,

Versus

DIDAR SINGH AND OTHERS,—(DEFENDANTS).—

RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 1110 of 1899.

Custom—Inheritance—Unchastity of widow—Effect of, in regard to estate vested in her—Hindu Law.

A Hindu widow who had inherited the estate of her deceased husband in the absence of a special custom to the contrary is not liable to forfeit that estate by reason of her unchastity after the death of her husband.

Fatteh Singh and another v. Kalu and another ⁽¹⁾ and *Moni Ram Kolita v. Keri Kolitani* ⁽²⁾ followed.

*Further appeal from the order of D. O. Johnstone, Esquire,
Divisional Judge, Amballa Division, dated 1st May 1899.*

Golak Nath, for appellant.

The judgment of the learned Judge was as follows :—

ROBERTSON, J.—In deciding this appeal the learned Divisional Judge appears to have acted upon his opinion on one point. He has held it to be quite clear that the result of the plaintiff's living after her husband's death as the mistress of another man involves forfeiture of her rights to her husband's estate. It is not easy to see how the lower Appellate Court has come so clearly to this conclusion. The judgment in *Fatteh Singh and another v. Kalu and another* ⁽¹⁾ is clear on the point that the general custom of this Province is against such forfeiture, and the Commissioner after enquiry has reported that defendants entirely failed to prove any such custom. Their Lordships of the Privy Council have laid it down very clearly that such custom is not in accordance with Hindu Law (see *Moni Ram Kolita v. Keri Kolitani* ⁽²⁾). It is not clear therefore on what grounds the Lower Appellate Court is so fully convinced that in this case where the plaintiff is a *bania* of a town, and presumably ruled by Hindu Law, that forfeiture follows unchastity. The plaintiff's suit was clearly within time, the pleas being that plaintiff's husband died 13 years ago, and she left his house 9 years ago, so that she clearly came into possession on her husband's death. I think therefore that the lower Appellate Court was clearly wrong in

16th Feby. 1901.

⁽¹⁾ 107, P. R., 1888.⁽²⁾ I. L. R., V Cal., 776 (P. C.).

holding it proved in this case that the unchastity of the plaintiff after her husband's death, she having come into her inheritance when that death took place, causes forfeiture of her rights in that inheritance, assuming the unchastity to be proved.

As this erroneous view has been the reason for the dismissal of the appeal it amounts to a decision on a preliminary point, and I accordingly accept the appeal and remand the case under Section 562 for decision on its merits on the remaining points. Costs to be costs in the suit. Stamp on appeal to this Court to be refunded.

Appeal allowed: cause remanded.

No. 77.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

VIR BHAN,—(DEFENDANT),—APPELLANT,

Versus

MATTU SHAH,—(PLAINTIFF),—RESPONDENT.

Civil Appeal No. 851 of 1898.

APPELLATE SIDE. {

Pre-emption—Purchase of property in payment of previous debts—Market value—Good faith.

In a case for pre-emption where the transfer was in satisfaction of old debts if the market value of the property does not appear to differ very materially from the amount of the debts due from the vendor, and the price actually paid is the cancellation of all the liabilities mentioned in the deed, the price so paid may be held to have been fixed in good faith; but where the disparity between the market value of the property and the sum in satisfaction of which it has been accepted is very great and the debtor is clearly insolvent and the property in question taken in satisfaction was practically the debtor's only asset, the market value of the property is the proper test of the value of the consideration paid and not the nominal amount of the debts due.

Further appeal from the decree of J. A. Anderson, Esquire, Divisional Judge, Amritsar Division, dated the 9th May 1898.

Lal Chand, for appellant.

Madan Gopal, for respondent.

The judgment of the Court was delivered by

3rd April 1901.

ROBERTSON, J.—This is a suit for pre-emption in which the plaintiff claims to purchase certain land for its market value. The deed of sale stated the price to be Rs. 1,880 which was made up as follows:—

On account of a mortgage of 10th July 1893,	Rs. 1,120
On account of a bond of 5th July 1895	169
On account of a bond of 30th June 1894	150
On account of a bond of 17th January 1894	34
<i>Bahi</i> account	78
Costs of deed	22
Total	1,880

It will thus be seen that the whole amount is made up of previous debts. The right to pre-empt is not now in question, the only dispute before us is as to price. Plaintiff alleged that the debts did not amount to Rs. 1,880, nor was the land of that value.

There appears to us to be no doubt that the price was fixed in good faith as between the parties, *i.e.*, that the price actually paid was the cancellation of all the liabilities quoted in the deed, and we may remark that we do not see that when a creditor agrees to accept land in payment of previous debts of whatever amount, that it can be said that the price is fixed otherwise than in good faith if the creditor really and *bona fide* accepts the transfer of the land in full discharge of the transferor's liabilities. But we are not at variance with the views expressed by a Division Bench of this Court in *Baksha v. Karm and Dharma*, Civil Appeal No. 585 of 1890, in which it was pointed out that the arithmetical total of the previous debts might not be the actual measure of the consideration paid. In that case the sum due was far in excess of the value of the land transferred in satisfaction of the liability, and it was held that the sum paid was the value of the debt, not its arithmetical total; and it was held as a corollary that the market value of the land was the obvious test of the value of the consideration paid. To put it in another way the creditor had accepted a composition in full satisfaction of a much larger sum which he saw no way to recover as the debtor's only asset was the land which he accepted in full satisfaction, and the amount which a pre-emptor was bound to pay was the amount of the composition actually paid in discharge and not the nominal amount of the entire debt. This principle is, however, clearly one to be brought into play only when the disparity between the market value of the land and the sum in satisfaction of which it has been accepted is very great, and the debtor is clearly insolvent and the land in question taken in satisfaction is practically his only asset. We do not think it right to lay down as a general principle that the value of every debt admitted by the debtor to be due, is necessarily less than the legal liability, and in this case it is not clear

that the debtor was actually insolvent, and the market value of the land does not appear to differ very materially from the amount of the debts due from the vendor and in satisfaction of which the land was accepted.

The Commissioner valued the land at Rs. 1,504, and Rs. 1,500 has been allowed, or nearly five-sixth of the amount shown in the deed. The revenue of the land sold in this case is Rs. 30-2-6. Turning to page 28 of the Land Revenue Report for 1898-99, we find that that the average price of land in the Punjab sold during the previous three years was 65, 70 and 72 times the land revenue. The learned Divisional Judge has calculated at 50 times the revenue, but the average of the previous three years was nearer 70 than 60. If we apply the lowest figure of the three years, 65, we get upwards of Rs. 1,950. Under these circumstances we are unable to say that the value of the land or the value of the liability are either of them clearly below Rs. 1,880, and as that figure was fixed in good faith, so far as the sum total of debt to be wiped out is concerned, we see no reason to reduce it.

We accordingly accept the appeal and restore the order of the first Court, respondent will bear costs of appeal in this and the lower Appellate Court. Each party will bear their own costs in the first Court.

Appeal allowed.

No. 78.

Before Mr. Justice Chatterji.

HARI SINGH AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

THE MUNICIPAL COMMITTEE OF PINDIGHEB,—
(DEFENDANT),—RESPONDENT.

* Civil Appeal No. 208 of 1899.

Nuisance—Municipal Committee's power to carry water into a public drain—Municipal Act, 1890, Section 123—Injunction—Conditional injunction—Specific Relief Act, 1877, Section 56 (g).

The Municipal Committee of Pindigheb had diverted the flow of the waste water of a *dharmsala* by conveying it through a new masonry drain which emptied itself into a *katcha* drain in the public street, on which two suits were filed against the Municipal Committee, one by the owners of the houses whose houses abut in the public street for a perpetual injunction restraining the Municipal Committee from discharging the water of the *dharmsala* through the drain in the street, and the other by the person

* Case No. 209 of 1899 was also disposed of by the judgment in this case.

APPELLATE SIDE. }

in charge of the *dharmsala* for a similar injunction to restrain the defendants from interfering with the discharge of water through certain properties and diverting its flow to the drain in the street above-mentioned. The Court of first instance, whilst holding that the Municipal Committee was within its rights in constructing the new drain, found that if the old drain remained *katcha* the increased quantity of water discharged into it might during the rainy season cause some damage to the plaintiffs' houses, granted the injunction until the Municipal Committee converted the *katcha* drain into a *pacca* masonry one, but dismissed the second suit on the ground that the plaintiff has no status to maintain it, which orders were confirmed by the Divisional Judge. The plaintiffs in both cases appealed to the Chief Court on the grounds amongst others that the Committee had no power to alter the direction of the flow of water from private drains, or the direction of the drains, and that no conditional injunction should have been granted.

Held, that the plaintiffs in the first case had no right whatever in preventing the Committee from allowing the water to flow into their drain, and could only object if their rights are interfered with by the diversion, and only to that extent.

The Specific Relief Act contains no prohibition against a conditional injunction being granted, but that the form adopted was not correct, as it amounted to a temporary injunction of indefinite duration and not a perpetual one, the proper order would be to grant a perpetual injunction conditional upon defendant not removing the cause of prospective damage to the satisfaction of the Court within a fixed period.

Held, also, that public bodies like Municipal Committees should act in accordance with the procedure provided by the Statute governing their acts, but where with the tacit consent and acquiescence of the persons interested in a property they have acquired a footing with respect to the discharge of its waste water and do an act which has caused no damage but improved its conditions, interference by a Court of Justice would not be equitable.

Akilandammal and another v. Venkatachola Mudalai ⁽¹⁾, *Attorney-General v. The Corporation of Halifax* ⁽²⁾, and *Attorney-General v. Birmingham Drainage Board* ⁽³⁾ followed.

Further appeal from the decree of G. L. Smith, Esquire, Divisional Judge, Rawalpindi Division, dated 9th November 1898.

Ishwar Das, for appellants.

Maya Das, for respondent.

The judgment of the learned Judge was as follows :—

CHATTERJI, J.—The material facts of this case are stated in sufficient detail in the judgment of the first Court, and I see no need to recapitulate them. The plaintiffs are certain house owners whose houses abut on a public street in the town of Pindigheb.

⁽¹⁾ 6, *Mad.*, H. C. R., 112.

⁽²⁾ 39, *L. J. Ch.*, 129.

⁽³⁾ *L. R.*, XVII Ch. Div., 685.

23rd April 1901.

A drain runs along this street through which the surplus water of the residents of the street and others is discharged. There is a *dharmsala* to the east of plaintiffs' houses which has a well, the waste water of which used to run to the north through certain premises in that direction. The Municipality have diverted the flow of this water from the north, and constructed a masonry drain through which it now runs on to the drain in plaintiffs' street.

Two suits have been filed against the Municipality, (1) by the appellants in this appeal for a perpetual injunction restraining the Committee from discharging the water of the *dharmsala* through the drain in their street, and (2) by the person in charge of the *dharmsala* for a similar injunction to restrain the defendants from interfering with the discharge of water through the properties lying to the north and diverting its flow to the drain in the street above-mentioned. Both cases possess many points in common on which they can in my opinion be disposed of, and I propose therefore to write a single judgment in both. The question of the plaintiffs' *locus standi* in the second case has been decided in his favour by the Divisional Judge, and is not pressed before me by the respondents. One point of difference is thus got rid of.

In the present appellants' suit the injury complained of comes under the head of nuisance in technical language. It is that the defendants by allowing the water of the *dharmsala* to flow into a public drain belonging to them, which runs along a public street which is also their property, but on which plaintiffs' houses abut, have so increased the volume of the water that plaintiffs' houses are in danger, and they are interfered with in the proper enjoyment of their property. They also complain that the *dharmsala* water which flowed for the last eighty years towards the north could not be diverted to this drain, but this is no concern of theirs, and they have no right to object to the defendants' act unless they can show specific injury to themselves. They have alleged such injury, but they do not in the plaint set up any other kind of nuisance than that stated above.

In the *dharmsala* case the wrong committed by defendants comes technically under the head of trespass as they are said to have unlawfully constructed a drain on *dharmsala* land which is an interference with possession of property, but a nuisance is also alleged in that the road to the institution is rendered narrow and muddy by the new drain.

With reference to the present appeal, the law requires that an injunction shall not be granted on the ground of a nuisance against

an act unless it is reasonably clear that it will be a nuisance—Section 56, clause (g), Specific Relief Act. The first Court finds that no ostensible damage can be caused by the defendants' act except that, if the drain remains *katcha* as it is now, in case of rain the volume of water may be too large to be freely discharged, and that plaintiffs' walls might be injured by damp or undermined. It may be questioned whether the evidence is clear to the effect that there is a great probability that the above injuries will result, and a mere possibility is not sufficient. The injury must also be a substantial one, Nelson on the *Law of Injunctions*, pages 396 and 397. Possibly the case could have been met by awarding damages, but no damages had actually accrued as had been alleged in the plaint. I need not, however, go into this question as defendants have not appealed from the grant of injunction which was maintained by the Divisional Judge's decree, but the matter may be taken into consideration in deciding whether the condition attached to the injunction should be discharged or not. For plaintiffs have got relief by injunction, and their complaint now is that it should have been without the conditions attached to it.

After considering the arguments of plaintiffs' counsel I am inclined to think that, taking all the circumstances into consideration, the Lower Courts have exercised a right discretion in attaching conditions to the injunction granted. An unconditional perpetual injunction might have had the effect of interfering with the statutory rights and even the duties of the defendants. The plaintiffs have no right whatever to prevent the defendants from letting the water of the *dharmsala* flow into their drain. They can only object if their rights are interfered with by the diversion, and only to that extent. The first Court acting on the expert opinion of defendants' witnesses found for plaintiffs on the question of prospective damage to them, and has framed its order in accordance with that opinion. The jurisdiction in equity in cases of this kind must be plenary, so that the Court may be able to give relief proper to the circumstances of the case and ought not to be hampered by rigid rules. The act contains no prohibition against conditions, nor did plaintiffs' counsel, if I understood his arguments aright, advance such a contention; he objected rather to the nature of the condition. In *Akilundammul and another v. S. Venkatachala Mudali* ⁽¹⁾, an injunction was granted conditional upon defendant not removing the cause of nuisance to the satisfaction of the Court within two months. And English Courts have sometimes suspended the issue of an injunction for a year, *Attorney-General v. The Corporation of Halifax* ⁽²⁾,

⁽¹⁾ 6, *Mad., H. C. R.*, 112.

⁽²⁾ 39, *L. J. Ch.*, 129.

and even for five years, *Attorney-General v. Birmingham Drainage Board* ⁽¹⁾.

Perhaps the form of the injunction as given in the decree is not correct. It amounts to a temporary injunction of indefinite duration and not a perpetual one, and is possibly open to the objection that it is one not contemplated by law. The objection is however a merely technical one, as the injunction ought to be treated as a perpetual one with a provision that it will come to an end on the happening of a certain contingency. For the protection of the defendant's statutory powers and duties, a clause of this kind was advisable, but I think it will be more in accordance with law to follow the rule adopted by the English and Indian authorities cited above.

I therefore accept this appeal so far as to strike out the words "so long as the Committee do not construct a new drain on its own land not calculated to cause any damage to plaintiffs" from the decree, and in lieu thereof grant a perpetual injunction prohibiting the defendants from diverting the water of the *dharmsala* into their drain if they do not, by the 31st day of July next, construct a masonry drain along the street in front of plaintiffs' house which will be sufficient in the opinion of the Court of the District Judge to carry off all the water that ordinarily runs through that drain as well as the water of the *dharmsala* without causing any damage to plaintiffs' houses. On failure of the defendants to construct such a drain by the date fixed the injunction will come into force.

Parties will pay their own costs in this Court.

In appeal No. 209, the finding of the Courts is that the defendants' act causes no nuisance whatever, so that this ground of action fails. As regards trespass, the facts are that the defendants have been looking after the water of the *dharmsala* for some time. They constructed the *chobacha* or reservoir in which the water drawn from the well for the use of the visitors to the *dharmsala* is stored. Defendants distinctly alleged it, and that they have kept the well and *chobacha* clean and in repair. This was partially admitted by the plaintiff in his replication, and Bishen Singh, one of his witnesses, admitted the defendants' statement. See also evidence of Hari Ram for defendants. The defendants have also constructed a *picca* drain to a certain distance beyond the *dharmsala*. Although the Committee took no steps in accordance with the Municipal Act, I think they could have ordered the diversion of the water and the construction of

(1) *L. R.*, 17 *Ch. Dn.*, 685.

the *pacca* drain under Section 123, subject of course to causing no injury to the plaintiffs' property by such order. They did not issue such notice and provided the drain at their own cost. Although acts of trespass on private property by powerful public bodies require to be put down by the Courts, and it is no defence to say that the act complained of though not done in accordance with the procedure provided by the statute governing them could have been so done (Keer on *Injunctions*, pages 118, 119), yet in the present instance the defendants are more favourably placed with respect to the *dharmsala*, and the equity in favour of the plaintiff is not strong. Admittedly the defendants built the *chobacha* and they are shown to have been looking after it and the well, and they thus have, with the tacit consent and acquiescence of the plaintiffs and others interested in the *dharmsala*, acquired a footing with respect to looking after the discharge of the water. Then their act has caused no damage, but has improved the sanitary condition of the *dharmsala*, and they have defrayed the expenses of the new drain themselves. Under the circumstances, interference by the Court would not be equitable, and it would only lead to useless trouble and litigation if the defendants are now told to make use of their statutory powers before taking action with reference to the drainage of the institution. In this view I consider there is no substantial ground to interfere with the decree of the Divisional Judge.

I therefore dismiss appeal No. 209 with costs.

No. 79.

Before Mr. Justice Chatterji and Mr. Justice Maude.

SOHNUN AND OTHERS, —(PLAINTIFFS),—APPELLANTS,

Versus

RAM DIAL AND OTHERS, —(DEFENDANTS),—RESPONDENTS.

APPELLATE SIDE.

Civil Appeal No. 1306 of 1898.

Custom—Adoption—Adoption of sister's son—Acharjya Brahman of Goler in the Dehra tahsil of the Kangra District—Burden of proof.

One R. D., an Acharjya Brahman of Goler in the Dehra *tahsil* of the Kangra District, executed a deed of adoption in favour of 'K,' his sister's son, reciting that K had been adopted when two or three years old and had ever since been treated as a son. Plaintiffs, collaterals of R. D., sued for a declaration setting aside the deed on the grounds that K was, in fact, never adopted, and that the adoption was invalid by custom and Hindu Law. The first Court found that the adoption was not opposed to custom, but that there was in fact no adoption as recited in the deed, though K. had lived with R. D. for many years and assisted him in his business, and gave plaintiffs a decree that K. was not the adopted son of R. D. The Divisional

Judge on appeal reversed the decree on the ground that the *factum* of adoption had been clearly established, and further that by custom the adoption was valid. The plaintiffs preferred a further appeal against those findings to the Chief Court.

Held, that where the parties are not members of an agricultural tribe or landholding group and where no ceremonies are essential, and the adoption not opposed to custom, a declaration by deed, if coupled with previous and subsequent treatment as an adopted son, was sufficient to constitute adoption.

Held also, that in cases where the right of adoption is admitted or is found to prevail and the parties are not members of an agricultural tribe, or landholding group, the burden of proof ought to lie on those who deny that a particular kind of adoption, *e. g.*, that of a daughter's or sister's son, cannot be made.

Found, upon the evidence that plaintiffs had failed to prove that by custom among Acharjya Brahmans of Kangra (who are not members of an agricultural tribe or landholding group) the adoption of a sister's son was invalid.

Ralla v. Budha (1) distinguished, and the subject of adoption among non-agricultural twice-born Hindu classes in the Punjab discussed.

Further appeal from the decree of Khan Bahadur Syad Muhammad Latif, Divisional Judge, Hoshiarpur Division, dated 11th July 1898.

Ishwar Das, for appellants.

Lal Chand, for respondents.

The judgment of the Court was delivered by

1st May 1901.

CHATTERJI, J.—In this case the material facts are these: Ram Dial, an Acharjya Brahman of Goler in the Dehra *tahsil* of the Kangra District, on 17th April 1897, executed a deed of adoption in favour of Kanhaya, his sister's son, reciting that Kanhaya had been adopted when two or three years old and ever since treated as a son, and that he, as Ram Dial's *dharam-putar* would succeed to his property and perform his *kirya-karam*. Plaintiffs descendants of Ram Dial's grandfather, have sued for a declaration setting aside the deed alleging that (1) Kanhaya was in fact never adopted, and (2) that the adoption is invalid by custom and Hindu Law. Defendants denied these allegations and upon the pleadings six issues were drawn, of which the first three alone are now important. The first issue relates to the validity of the adoption by law and custom, the second to the *factum* of the adoption, and the third raises the question what would be the effect of an adoption simply by deed as distinguished from adoption from infancy with subsequent treatment as son and heir. The first Court, the District Judge of Kangra, found that the adoption

was not opposed to custom, but that there was in fact no adoption as recited in the deed, though Kanhaya had lived with Ram Dial for many years and assisted him in his business. The other issues were also decided in plaintiffs' favour. The learned District Judge doubted whether the plaintiffs were entitled to a declaration that Kanhaya had not been adopted, and was distinctly of opinion that they could not ask for cancellation of the deed which might any moment be perfected by a formal declaration of adoption by Ram Dial before the brotherhood and subsequent treatment as son. But inasmuch as these contingencies might not after all occur, he gave plaintiffs a decree that Kanhaya was not the adopted son of Ram Dial.

The Divisional Judge on appeal found that the *factum* of adoption had been clearly established, and, further, that by custom the adoption was valid. He accordingly dismissed the claim.

The first point for determination in this appeal is whether the adoption is valid. In order to decide this question, it is necessary first to lay down on whom does the *onus* of proving the validity of the adoption lie. If the parties are members of a landholding group such *onus*, creed, tribe and locality apart, lies on the person asserting that daughters' or sisters' sons can be adopted in the presence of near agnates without their assent (*Ralli and others v. Bulhi and others* ⁽¹⁾). To find out whether the ruling applies it has to be decided whether the parties can be said to belong to a landholding group. They, no doubt, hold some land, though it has not been clearly shown whether the land is ancestral as between the plaintiffs and the defendant, Ram Dial. In my opinion, the words "landholding group" in the judgment are used in a sense synonymously with "agricultural tribe or community" in other judgments, see *Khazan Singh and others v. Maddi and others* ⁽²⁾ at p. 474, *Gurmukh and another v. Ganga Ram and another* ⁽³⁾, *Sham Das v. Mussammatt Hemi Bai and another* ⁽⁴⁾, generally supports the same view, and the remarks in *Kartar Singh and another v. Mathur Singh* ⁽⁵⁾ at p. 339 seem to be very much in point. There is no evidence to show that the parties belong to an agricultural section of Brahmans, though they hold some land. They are Acharjyas and have *birts* and also practise trade and money-lending in a small way, and are not dependent for their living on agriculture. They cannot therefore be called members of a landholding group. Moreover villages in the Kangra hill tracts are not as a rule held on a tribal tenure (*Shaman and others v. Sardhi and others* ⁽⁶⁾).

⁽¹⁾ 50, P. R., 1893 (F. B.).

⁽²⁾ 122, P. R., 1893.

⁽³⁾ 81, P. R., 1895.

⁽⁴⁾ 73, P. R., 1896.

⁽⁵⁾ 94, P. R., 1898.

⁽⁶⁾ 61, P. R., 1898.

There is nothing to distinguish the village of Goler, in which Ram Dial and the plaintiffs reside, in this respect. I am of opinion, in view of the foregoing considerations, that the rule laid down in *Ralla and others v. Budha and others* ⁽¹⁾ is not applicable to this case.

Failing the principle of that decision, we are thrown back on Hindu Law or the custom of the parties' caste and locality. If the Hindu Law were applicable, the adoption, if it is in the *dattaka* form, would be invalid. This matter has been finally set at rest by the decision of their Lordships of the Privy Council in *Bhagwan Singh v. Bhagwan Singh* ⁽²⁾. Both the Courts below are agreed, though on a different ground, that the adoption is valid by custom. The Divisional Judge's reasoning is somewhat confused, as he holds that the parties belong to an agricultural community and yet at the same time that they are not governed by the rule laid down in *Ralla and others v. Budha and others* ⁽¹⁾. He finds, however, that the adoption was one in the *kritrima* form, and that, therefore, there is no restriction against the adoption of a sister's son even though the parties are Brahmans. The District Judge found that the parties were not agriculturists, and that, therefore, there is no presumption against the validity of the adoption. He further held that the parties were not bound by Hindu Law as regards adoption, and that the adoption in this case cannot be treated as one in the *dattaka* form. He finally decided on the authority of certain rulings and text-books that the adoption is good, and that plaintiffs had failed to show that it was bad.

As to whether the adoption is to be treated as of the *kritrima* kind, as the Divisional Judge finds, it is difficult to give a clear opinion on the existing record. The text-books on Hindu Law do not mention the Punjab as a place where that form of adoption is in vogue. Bhattacharji alone considers that it prevails in the Punjab and Kashmir, though it is called customary adoption. This is his opinion, based on the result of such inquiries as he was able to make. (*Hindu Law*, 2nd Edition, p. 212). In *Dera Singh and another v. Nihal Singh and another* ⁽³⁾ Lindsay J. appears to have treated a case of customary adoption among Jats as *kritrima* one, and decided it according to the provisions of Hindu Law, but the other Judge said nothing definite, beyond stating that the results of the customary adoption are similar to those of a *kritrima* adoption. In *Mussamat Rukmani v. Mussamat Salukhni* ⁽⁴⁾, Sir Meredyth Plowden, after

⁽¹⁾ 50, P. R., 1893 (B. F.).

⁽²⁾ I. L. R., XXI All., 412, P. C.;
I. R., XXVI I. A., 153.

⁽³⁾ 9, P. R., 1880.

⁽⁴⁾ 147, P. R., 1889.

discussing these points of similarity, says “* * it has been inferred “that the *kritrima* form prevails here, whereas the truth probably “is that neither form prevails, and that adoptions among agri- “culturists are generally informal and customary adoptions.” The word *kritrima* is practically unknown in these parts and is never used in adoption deeds. It is not used in the deed in dispute. It is difficult therefore merely on the ground of certain similarities between *kritrima* adoptions and customary adoptions in this Province to say that they are identical. The similarities do not extend beyond certain points. The fiction of affiliation does not exist in *kritrima* adoptions nor the restrictions that apply to the *dattaka* form regarding the person to be adopted. Nor are any particular religious ceremonies necessary in them. These features are found in customary adoptions generally, but when this is said the points of resemblance are practically exhausted. It is essential in all *kritrima* adoptions that the adoptee should consent to his adoption and the relationship is confined to the adopted son and the adopter and does not extend even to the latter’s wife. This cannot be predicated of all customary adoptions, and though there is no restriction of age in the latter, adoptions of infants are the rule, and the child is generally given by the parents while the relationship certainly extends to the husband or wife of the person adopting.

The truth probably is that the *kritrima* is an old form of customary adoption which survives in certain localities owing to the attachment of the people to it when all other forms have disappeared, and the *dattaka* one has become universally prevalent. But, like the *dattaka*, it also has been reduced to something like a system and is now regulated by definite rules, some of which I have mentioned above, while the Punjab customary adoption is more untrammelled and is still in a somewhat fluid state. On the whole, I am of opinion, after carefully considering the argument, that it has no direct bearing on the question of *onus*, but is of value as drawing attention to the fact that the restrictions which properly apply to adoptions in the *dattaka* form can only be pressed against an adoption which is shown to be made in that form and not against every adoption made in this Province. In other cases unless a rule such as that laid down by the Full Bench in *Ralla and others v. Budha and others* ⁽¹⁾ applies, the matter ought to be established by evidence.

In cases of the last-named class I think if the right of adoption is admitted, or is found to prevail among the parties’ caste or

(1) 50, P. R., 1893.

tribe, the *onus* ought to lie on those who deny that a particular kind of adoption, e.g., that of a daughter's or sister's son, cannot be made. The present plaintiffs appear to me to be in this position. The adoption is not one in the *dattika* form, so that the objection to a sister's son being adopted by a Brahman does not apply. The parties are not members of an agricultural tribe or landholding group, and, therefore, the principle of *Ralla v. Budha* ⁽¹⁾ has no application. Plaintiffs do not deny that adoption can take place in their caste or tribe. They, therefore, should show that a sister's son cannot be adopted.

Coming now to the consideration of the evidence on the question of custom, I am of opinion that it has not been affirmatively shown that the adoption of a sister's son is not allowed among Acharjya Brahmans of Kangra. The plaintiffs have produced practically no evidence to support their contention. The *Riwaj-i-am* of the revised settlement was referred to by the Divisional Judge to show that such adoptions are permitted, and this is said to be a mistake by appellants' counsel, who says that the word *kaum* means "*gôt*" or "*tribe*" and not caste. It is true that the word is often employed in this sense, and the expression *ghair kaum* is frequently used in *Wajib-ul-arz* to denote persons who do not belong to the clan, see *Ralla v. Budha* ⁽¹⁾ at p. 233. But the word is also used to designate the *zat* (*Jat*) or caste, see Fallon, p. 892, e.g., *kaum* Afghan, and in this sense among exogamous people the daughters' and sisters' sons would be within the *kaum*. Sir James Lyall, who made the settlement in which the *Riwaj-i-am* was compiled, appears to have understood it to refer to the "*gotar*" or clan (Kangra Settlement Report, p. 72). This would support the appellants' argument and show that the Divisional Judge is in error, but Sir James Lyall goes on to say: "It is doubtful whether public opinion would support the adoption of a son from another clan if the kinsmen objected, unless perhaps in the case of a daughter's son, and even then there would be a difference of opinion, but the majority would, I think, support the validity of the adoption." I am thus inclined to hold that the *Riwaj-i-am* cannot be confidently said to make it reasonably certain that the adoption of sons of very near females such as daughters and sisters would be regarded as opposed to custom. The absence of definite evidence from the plaintiffs' side to prove it appears to me to be a cogent ground for thinking that custom is not clearly in their favour.

⁽¹⁾ 50, P. R., 1893.

There are numerous reported cases in which such adoptions have been held valid by custom among Brahmans of the Punjab and other twice-born classes, such as Khatriis and Aroras (*Dhani Ram v. Mussammatt Man Kour* ⁽¹⁾, C. A. No. 1227 of 1874; *Lachmi Dhar and another v. Thakur Das* ⁽²⁾) in which a great number of authorities are reviewed. In *Atma Singh v. Jutta Singh* ⁽³⁾ and *Taba v. Shib Churn* ⁽⁴⁾ of the same record, it was held that no special custom had been proved different from that found generally to prevail in the Punjab, rendering the adoption of a daughter's son invalid. These were cases among Khatriis. *Mussammatt Parmeshri and another v. Vasdeo* ⁽⁵⁾ (among Aroras of Lahore), and *Ganda Mal v. Mussammatt Radhi* ⁽⁶⁾, (Khatriis of Ferozepore) are also cases in point as also *Harnaman v. Atma Ram* ⁽⁷⁾ Khatriis of Tahsil Pipli. In *Harri Singh v. Gulaba* ⁽⁸⁾ it was laid down that by the custom of the Punjab the adoption of a daughter's son is valid. This decision is criticised at length in the Full Bench case of *Ralla v. Budha* ⁽⁹⁾, and Sir Meredyth Plowden was of opinion that it would have been proper to hold on the strength of the authorities cited in the former judgment, that by custom of the Punjab a daughter's son is not incapable of being adopted and that his adoption is to be presumed not to be invalid on that ground. The authority of first-named ruling has been set aside by the later Full Bench decision only as regards landholding groups. It may, I think, be fairly held therefore in the absence of sufficient evidence to show that such adoptions are not allowed by custom that they are valid. It is true that high caste Khatriis and Brahmans resident in towns are frequently found to be governed by Hindu Law or by customs which do not differ from that law, but the parties are residents of a village. It is probable that the rules regarding adoption in this Province are survivals of customs older than the provisions reduced to a logical system and embodied in text-books written by Brahmanical lawyers. The prohibition against the adoption of a daughter's or sister's son among the twice-born classes is not only confined to the *dattaka* form, but apparently is a very modern development of the law in regard to that form. The prohibition has been upheld in numerous decisions of the superior Courts in India, and it is mainly on the ground that a different decision based on the examination of the original authorities would unsettle titles and create much confusion that their Lordships of the Privy Council

(1) 13, P. R., 1873.

(2) 149, P. R., 1883.

(3) 64, P. R., 1883.

(4) 162, P. R., 1883.

(5) 35, P. R., 1885.

(6) 57, P. R., 1886.

(7) 24, P. R., 1900.

(8) 50, P. R., 1874.

(9) 50, P. R., 1893.

refused to disturb them. But many eminent Hindu lawyers doubt the correctness of the doctrine, which is mainly supported by the author of the *Dattaka Mimansa* on the authority of two ancient texts, see remarks of Mr. Golab Chandra Shashtri in his learned work on the Hindu Law of Adoption (Tagore Law Lectures, 1888), p. 342. The adoption of a daughter's or sister's son is allowed among Brahmans of Southern India, *Vayidinada v. Appu* (1), and among Bohra Brahmians and Jains in the North-Western Provinces (*Chainsukh Ram v. Parbati, Sr.* (2); *Lakhmi Chand v. Gatto Rai* (3)). The prevalence of customs of this kind among people so widely separated geographically is, as Sir Willam Rattigan says, a most interesting fact to the student of comparative jurisprudence, and suggests the inference that they had a common origin in the remote past. The Punjab custom therefore is probably a survival of a widespread one which once prevailed all over India among people of the Hindu faith and has become obsolete in many parts owing to the influence of Brahman logicians and lawyers. There should, therefore, be less hesitation in holding on the strength of the precedents cited that such adoptions are permitted among Brahmans of the parties' class and locality. I would therefore uphold the finding of the lower Courts as to the validity of the adoption, though for different reasons.

The next question for consideration in this appeal is as to the *factum* of the adoption. The deed recites that Kanhaya was adopted when a child and the Courts below have come to different findings on this point. The District Judge after an elaborate criticism of the evidence came to the conclusion that no such adoption was proved, and that the recital was false. The Divisional Judge, on the contrary, found that the adoption was fully established. I do not think it necessary to go into the evidence in detail, but my opinion on the whole decidedly is that the view of the first Court is correct. The proof of adoption in infancy is exceedingly vague and is not reliable. The only witnesses who mention the fact of giving and taking are Rikhu, Brij Lal and Ram Dial defendants. The statements of the last are discrepant and the story told by Brij Lal is rather extraordinary, while Rikhu's evidence apparently contradicts that of Brij Lal as to the place of adoption. The strictures of the District Judge on the witnesses appear to me to be justified. As regards ceremonies at the time or the calling of the brotherhood there is no allegation on the defendants' part. Ram Dial no doubt performed two marriages

(1) *I. L. R.*, IX *Mad.*, 44.(2) *I. L. R.*, XIV *All.*, 53.(3) *I. L. R.*, VIII *All.*, 319.

of Kanhaya paying the expenses from his own pocket, but the latter's first marriage took place at the house of Hardas, Kanhaya's natural father, for which there is no adequate explanation, and this also discredits the evidence as to his tonsure and investiture with the sacred thread. From the performance of Kanhaya's ceremonies no argument in favour of his adoption can be safely drawn. The strongest point against the defendants' story is the fact that in numerous documents and proceedings in and out of Court Kanhaya's father's name has been put down as Hardas. Kanhaya explains that he used to mention both his natural and his adoptive fathers' names to the writers of the deeds and records. This may be partially true, for in one instance, he was put down as the son of Hardas after the institution of the present suit, though it must be clear that after the execution of the deed, he must have been giving himself out as the adopted son of Ram Dial. But the uniform entry of Hardas' name as his father in all the prior deeds and papers can suggest only one inference, *viz.*, that he so described himself, and this is fatal to the story of adoption in infancy.

At the same time there is no doubt that there was something special in the treatment of Kanhaya by Ram Dial, which cannot be accounted for on the score of his natural relationship with Ram Dial or of charitable feelings on the latter's part. There was another son of Hardas, but he was not so treated, and it is admitted by the plaintiffs themselves that Kanhaya has lived with Ram Dial since the last 15 years with his wives and has been helping Ram Dial in his business and been maintained by him. It is a fair presumption that Ram Dial had a liking for Kanhaya and had special intentions about him which led him to keep him in his house. If there was no adoption there is some ground for thinking that Ram Dial had it in his mind to constitute Kanhaya as his heir.

Such an intention if it can be legitimately inferred from the treatment would not be sufficient under the circumstances to make Kanhaya the adopted son of Ram Dial in the absence of some unequivocal act giving expression to it. I regard the deed as such an act. It distinctly declares Kanhaya to be Ram Dial's adopted son, the word *dharam-putar* being equivalent in this instance to *mutbanna*, and to be entitled to succeed to Ram Dial's property as his heir. It is argued that a mere deed is not sufficient to constitute adoption. No doubt by itself it may not be enough in certain cases, *e.g.*, where a declaration before, or acceptance by, the brotherhood is necessary. This is required among landholding groups. Otherwise if no ceremonies are essential and the adoption

is not opposed to custom, I see no reason why a declaration by deed should not, at least when it is coupled with previous and subsequent treatment, be enough. In the *Rivaj-i-am* of some districts, *e.g.*, Ferozepore and Hoshiarpur, it is one of the recognized modes of adoption. If the deed alone is written and there is no prior or subsequent treatment and the executant dies very soon afterwards, the deed may be tantamount to nothing more than a will and some doubts as to its sufficiency may arise. But the present is not a case of paper adoption. There was previous treatment indicating such an intention and Ram Dial has stuck to his deed and it is not alleged that he is not treating Kanhaya as a son. Moreover the ordinary presumption is that Ram Dial has full power of disposition over his property (see *Kartar Singh v. Mathar Singh* (1)). Under the circumstances, I consider the adoption is sufficiently established though the recital in the deed may be incorrect, (*Girdhari Lal v. Dalla Mal* (2) at p. 10).

There is no other point in the appeal which requires discussion. I am of opinion that plaintiffs are not entitled to the declaration they seek, and that their claim has been rightly dismissed by the Divisional Judge. It is doubtful whether on his findings the District Judge exercised a proper discretion in giving them a decree.

I would dismiss this appeal with costs.

Appeal dismissed.

No. 80.

Before Mr. Justice Chatterji and Mr. Justice Maule.

SHAD ALI KHAN,—(PLAINTIFF),—APPELLANT,

Versus

ABDUL GHAFUR KHAN AND ANOTHER,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 269 of 1896.

Custom—Alienation—Will—Pathans of Peshawar District.

Found, that by the custom prevailing among Pathans of the Peshawar District, a father is competent to make an unequal distribution of his immovable property among his sons by will.

First appeal from the decree of W. B. DeCourcy, Esquire, District Judge, Peshawar, dated 2nd December 1895.

Lal Chand, for appellant.

Umar Bakhlsh and Madan Gopal, for respondents.

(1) 94, P. R., 1898.

(2) 3, P. R., 1901.

The judgment of the Court was delivered by

MAUDE, J.—The facts are fully explained in the order of this Court, dated February 15th, 1898 (*P. R.*, 24 of 1898) remanding the case to the Court of the District Judge for a full and exhaustive enquiry as regards the question whether Muhammad Ibrahim Khan was or was not competent with reference to custom to execute the will relied on by the defendants. The evidence of a large number of witnesses has now been recorded, and the records of several cases have been referred to and examined, while the District Judge has written a very full order discussing each instance cited in those records. As regards the oral evidence, it is unfortunately of little or no assistance, for such is the state of factious feeling among the Pathan families of the Peshawar Valley that the District Judge felt himself unable to regard the evidence as untainted by partisanship. The instances, evidenced by Judicial records, which are held by the District Judge to be in favour of the validity of the will are said to be thirteen in number, but as regards the last of them it must be observed that the will propounded was found by the Divisional Judge to be a forgery. The other twelve instances which have been set out *seriatim* by the District Judge are more or less in favour of the defence. It is unnecessary to repeat the exact nature of each case, but it is convenient to allude to the more salient features of some of them. The first instance is that of a suit between Sher Ali Khan and Khowaja Muhammad Khan, sons of Surluland Khan of Hoti (Civil Appeal No. 1806 of 1888 in this Court). There was a will executed on December 8th, 1871, but the validity of the will was not in dispute.

10th May 1901.

The second instance concerned the Khans of Toru, and the document in dispute was executed on May 2nd, 1860. It was not, however, strictly a will, but rather was intended to be a deed of gift, though apparently the writer died soon after he had executed the document and possession had not been given to the donee. The end of the litigation was that the provisions of the deed were upheld.

The sixth case concerned a true will, dated November 24th, 1890, but the power of testation was not in dispute.

The seventh instance relates to the will of Ajab Khan of Chargolai executed on February 18th, 1874, which some years later became the subject of litigation between his sons. Ultimately the dispute was compromised, and the terms of the will were adhered to.

The eighth instance is that of a will executed by Nusr Khan of Hamzakot on December 23rd, 1884.

The District Judge has observed that the document was really disputed by the plaintiff's brothers as being a forgery, but it is also the fact that the power of testation was specifically denied. The result was that the will was supported and acted on.

The tenth case is a suit brought by one of the sons of Hujab Khan of Prang to recover possession of certain land from his brothers, who propounded a will executed by their father in 1875. The power of testation was denied by the plaintiff, but ultimately the case was decided by arbitration and the will upheld. The defendants' arbitrator and the umpire held that the will was valid, and that a full proprietor had power by custom to will away his property as he pleased.

The twelfth case concerns a will executed in 1889 by one Kabud, which was resisted in the first Court on the ground that it was a forgery. When the genuineness of the will was established to the satisfaction of that Court, and the defendant appealed, he attempted to raise the question of the power of the testator by custom to make a will, but the Divisional Judge declined to examine the point at that stage and affirmed the order of the first Court.

In addition to the cases instanced by the District Judge there is a first appeal now pending in this Court (No. 950 of 1897) concerning the division of the estate of one Khushal among his sons. There is no dispute now about a will, but a will was executed by Khushal in 1885, under which he left the whole of his property to his eldest son for ten years after his death, with directions that after that period it should be divided equally among his five sons. Khushal's right to make the will was settled in a previous suit.

No doubt some of the instances given do not show that an unequal distribution of property was made by will, still the fact remains that fathers have been proved to have made wills which have been upheld by the Courts, while in some cases the distributions made have benefited one son at the expense of another. On the other hand, only one judicial decision has been cited in support of the contention that the power of testation does not exist. That decision is one given in 1893 by the Divisional Judge of Peshawar, who, however, did not examine the question, exhaustively, but merely remarked that though by the custom of the parties as recorded at settlement in the *Riwaj-i-am*, a proprietor could

alienate his property as he chose, yet a deed, and giving of possession were essential to the validity of the alienation, and that there was no mention of the validity of wills.

In the volume of Customary Law of the main tribes of the Peshawar District, published in 1899, subsequent to the order of remand in the present case, it is stated on page 21 that the representatives of the Utmannama tribe agreed with those of many other tribes that a proprietor has power to dispose of his property by oral or written testament, while it is also remarked that no clear instance of a contrary custom was brought forward by those who differed from the majority. On the following page it is further said that the Yusafzais and several other tribes acknowledged no restrictions on the power of bequest.

The plaintiff himself admitted in his examination that among his tribe a proprietor has power to dispose of his self-acquired property by will, and if it be granted that the majority of Pathans in the Peshawar Valley have the power of disposing of their property *inter vivos* as they please, and also of disposing by will of their self-acquired property, it is not unnatural that custom should come to recognize the more general power of testation in regard to all classes of property. After considering the instances which have been given, and attaching due weight to the Customary Law as recorded at the recent settlement, we are of opinion that it has been sufficiently established that the parties' father was competent to make the will in question, and that the terms of it should be enforced. The instances cited relate to wills executed and enforced during a period extending from the year 1860 onwards, and executed by Pathans residing in various parts of the Peshawar District. It is not therefore as though some of the members of one tribe only or residents of one locality had recently attempted to assert a new right opposed to well established custom.

(The rest of the judgment is not material for the purposes of this report.—ED., P. R.)

— — —
No. 81.

Before Mr. Justice Robertson.

FAKIR AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

DAULAT AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 1445 of 1898.

"Ancestral property"—Piragheb, tahsil and District Jhelum.

Held, that when the lands of a village are held by various races and were given simply to any one who would undertake their burdens a

portion of such land cannot be considered ancestral, merely because an ancestor may have held it or other land in the village in past times.

*Further appeal from the decree of Qazi Muhammad Aslam, C. M. G.,
Divisional Judge, Jhelum Division, dated 26th October 1898.*

Muhammad Shafi, for appellants.

Gurcharan Singh, for respondents.

The judgment of the learned Judge was as follows :—

10th May 1901.

ROBERTSON, J.—There is really only one important point left for decision in this case, and that is whether or not the land in question is to be held “ancestral.” The fourth ground of appeal to this Court probably states very fairly what was the state of affairs in this village in the olden time. The question is, whether accepting that as a correct statement of fact, the land in question can be considered *qua* the parties, ancestral? The statement is as follows :—“In times past people did not take lands for fear of “payment of Government revenue. Consequently at the time of “settlement in British rule that portion of land which was then “held by a person was recorded as his property.”

The question is, can land which one man refused to take up for fear of the burdens to be incurred, and which was taken up with its burdens by a relative, be considered ancestral because at some previous period the ancestor of these persons held land in the village, and then when the burden of their cultivation was too heavy for him, or some of his descendants, others came in and undertook it.

I am not prepared to say that in no such case could the land be considered ancestral. When the land has been given to the holder in virtue of his descent from an ancestor, although not actually succeeded to by him, this might be considered ancestral, but even this would be doubtful. But when the land has been given, as in many cases in these villages it was given, in Sikh times, simply to any one who would undertake its burdens, it does not seem correct to hold that land so taken is ancestral, merely because an ancestor may have held it or other land in the village in past times. Now at the first revised settlement it is entered that the lands of this village are held by various races, Jat Jhamat, Rajput Solon, Gakhar Ferozoyal, *mukhtalif murasan ki aulad ba rasad kabza*, descended from various ancestors, and the record goes on to say that the owners were not agreed as to other facts of village history.

I think in face of the plaintiffs' own statement quoted above, and of what is known so far, as to the origin and constitution of

the village that it cannot be said that the land is "ancestral." The lower Appellate Court has come to this conclusion, and no sufficient reason has been shown to me for differing from him. There is nothing to show that the land in question was held by a common ancestor, or indeed any ancestor, or that it came to the donor in virtue of his descent from any common ancestor of plaintiffs and himself. I see no reason therefore on this or any other ground to interfere with the decision of the lower Appellate Court, and I dismiss the appeal with costs.

Appeal dismissed.

No. 82.

Before Mr. Justice Chatterji.

JIWANDA MAL,—(PLAINTIFF),—PETITIONER,

Versus

MUHAMMAD ALI,—(DEFENDANT),--RESPONDENT.

} REVISION SIDE.

Civil Revision No. 15 of 1901.

Dismissal of suit for non-appearance of parties on the day fixed for delivery of judgment--Civil Procedure Code, 1882, Section 198.

Held that there is no rule of procedure to justify a Court in dismissing a suit for non-appearance of the parties on the day fixed for delivery of judgment.

Petition for revision of the order of Munshi Ahmad Shah, Munsiff, 1st Class, Gujrat, dated 25th October 1900.

The judgment of the learned Judge was as follows :—

CHATTERJI, J.—In this case the proceedings were complete. 23rd May 1901.
After various hearings and after taking all the evidence of the parties the case was on 15th October 1900 fixed for 22nd October for delivery of judgment. On that date neither party being present the case was fixed for the 25th. The parties being again absent, the suit was dismissed, but it is not specified in the order under what section of the Code.

In my opinion this order is clearly erroneous. The law imposes certain duties of appearing and conducting their cases on litigants as long as the case is under inquiry and penalties are provided in case of their failure in the discharge of those duties. Sections 98, 100, 102, 107 and 157 lay down the consequences of non-appearance at the first and subsequent hearings. Other sections prescribe penalties for not complying with orders issued by the Court, but there is no provision for dismissal of the suit for non-appearance on the day fixed for delivery of judgment. This stands to reason as the parties have then nothing to do with

the conduct of their cases which is complete and have only to hear the verdict of the Court. The date is not a date for *hearing*, for the case has by that time been fully heard and none of the Sections of the Code applicable to dates for hearing can apply. The date for judgment is fixed under Section 198 of the Code and no penalties are provided in that section or in any of the other sections of Chapter XVII for non-appearance on the day so fixed. The Court cannot do anything else but deliver judgment if it is ready, or appoint another date for its delivery if it is not. It is obviously not the intention of the Code that the Court should escape the duty of adjudicating on the merits, and the time, trouble and expense of the parties in conducting the proceedings should be thrown away, merely because they make default in appearing on a day on which they have nothing to do themselves but to hear the Court's decision on the case they have put before it. Courts of justice should do their best to decide cases on the merits and should not strain points of procedure in order to avoid doing so. There is no rule of procedure to justify the action of the Munsif in this instance, but on the contrary it appears to be clearly unauthorized and illegal.

There being no provision for an order of this kind the petitioner is not to blame if he has not filed an application for restoration of his case before the first Court.

I accept the application for revision and restore the case to the point it was at when the illegal order of dismissal was passed, and direct the lower Court to proceed to adjudication according to law. Court fees on the petition will be refunded. Other costs will abide the result.

Application allowed.

No. 83.

Before Mr. Justice Robertson and Mr. Justice Harris.

HAKIM RAI,—(PLAINTIFF),—APPELLANT,

Versus

MUHAMMAD DIN AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Civil Appeal No. 1205 of 1898.

Custom—Pre-emption—Pre-emption on sale of shop—Bazar Chauhatta Mufti Bakar, Lahore City—Punjab Laws Act, 1872, Section 11—Burden of proof.

Held, that plaintiff had failed to prove the existence of a custom of pre-emption in respect of sale of shops in Bazar Chauhatta Mufti Bakar of Lahore City.

APPELLATE SIDE. {

Held, also, that a *baithak* on the top of two shops does not alter the nature of the property, which property could not in consequence be considered a residential house.

(The subject of *guzars* in Lahore City discussed).

Further appeal from the decree of D. O. Johnstone, Esquire, Divisional Judge, Lahore Division, dated 25th July 1898.

Madan Gopal, for appellant.

Clark and Parker, for respondents.

The judgment of the Court was delivered by

HARRIS, J.—The Courts below have concurred in dismissing plaintiff's claim to pre-empt a property consisting of two shops with a *baithak* above, and situated in a part of the city of Lahore known as *Chauhatta* Mufti Bakar. 27th May 1901.

A further appeal has been preferred to this Court by the plaintiff on a certificate of the Divisional Judge as to the existence of the custom of pre-emption with regard to the property in suit.

For appellant it is here contended—

- (1) that *Chauhatta* Mufti Bakar is not a sub-division of the city within the meaning of Section 11, Punjab Laws Act, but is a small area forming part of *Guzar Rarra*, which is such sub-division;
- (2) that the property in suit should not be regarded as shop property, but as house property;
- (3) that the distinction with respect to pre-emption between shop and house property was one drawn by the Courts and not by the parties, and so should not here be considered;
- (4) that the evidence on the record establishes the custom in favour of plaintiff.

With regard to the first contention the Divisional Court took *Chauhatta* Mufti Bakar to be a sub-division within the meaning of Section 11, as it was there held that plaintiff had to prove a custom of pre-emption existing as to shops within that area. We cannot agree with the Divisional Judge that the *Chauhatta* in question is such sub-division. We understand the word "*chauhatta*" ordinarily to mean the shops at the four corners formed by the meeting of four streets. Plaintiff in his plaint described the property as being in *Mohalla* Mufti Bakar, but we cannot regard that as an admission that such area is a sub-division for pre-emption, or even that such a *mohalla* exists. The relevant deeds describe the property as in *Chauhatta* Mufti Bakar and in *Guzar Rarra*. The plan produced does not indicate any such *mohalla*.

The vendee-defendant professed ignorance of the limits of the *chauhatta*, and could not say whether there were 5 or 20 shops therein. The plan shows an adjacent *Chauhattu Bazar*, but the adjacent ways and buildings bear no names relating to Mufti Bakar. It is not contended that small lanes, *bazars* or areas usually fall within the term "sub-division" of the section, and nothing has been urged here to satisfy us that the *chauhatta* is a "sub-division."

On the other hand, we are entirely in accord with the lower Courts in finding *Guzar Rarra* to be too indefinite and rambling to be termed a "sub-division." That other *guzars* have at times been treated as pre-emption sub-divisions (e. g., *Guzar Talwara* in *Mirza Azam Beg v. Jai Dial* ⁽¹⁾) is not much to the point whatever the *guzars* originally meant, and in its primary sense a *guzar* must be taken to be a passage or street, and for what purposes intended, it appears clear that they are now more or less traditional. As remarked by the first Court, the mention of a *guzar* seems to be often a mere whim of the deed or petition-writer. It is true that in *Civil Appeal* 1011 of 1881, which is instance No. 2 of the first Court's judgment, *Guzar Rarra* is referred to. But a perusal of that file shows that the decision was really as to the Akbari *Mindi*, which was rather assumed than found to be part of *Guzar Rarra*, and it is to be remarked as regards the Akbari *Mandi* that that area has been indifferently described as part of two *guzars*, though the Courts below have fallen into a mistake as to *Mohalla Khatikan* being described as a *guzar* of that name. The oral evidence adduced in this case also points to ignorance of the meaning and limits of *Guzar Rarra*. No map has been produced showing *Guzar Rarra*, and the instances indicated here of deeds referring to *Guzar Rarra* when tested by the map are too scattered to form any idea of the limits of that *guzar*, or to enable us to conjecture the *chauhatta* here in question to be within those limits.

The second contention may be dismissed in a few words. The property is, we consider, essentially a shop property, and we do not regard the fact that the two shops below have a *baithak* above as altering the nature of the property. A *baithak* on the top of a shop at the corner of two *bazars* cannot be considered a residential house. That the property was described by some of defendants' witnesses and even by defendants as a *makan* is no matter, the word *makan* evidently having been then used as a generic term for a building, including shops as well as houses.

The third contention has no force though it has been pressed with some insistence upon our attention. The point was not

(1) 48 P. R. 1888.

taken on appeal, but apart from that we find from the record that the distinction was drawn by the parties, and was not drawn too late, the preliminary part of the cause up to the remand under Section 562, Civil Procedure Code, not having decided the question of custom. That question was thrown open by the remand order, and it was on the application of the defendants that a specific issue was framed.

It is not here contended that the distinction drawn between the cases of shops and houses in *Raman Mal v. Bhagat Ram* ⁽¹⁾ (disapproving of *Mirza Azam Beg v. Jai Dial and another* ⁽²⁾ *pro tanto*) is a wrong distinction. But it is urged that assuming, as we have found above, that neither the *chauhatta* nor *Guzar Rarra* is to be taken as the "sub-division" proof of the custom depends upon adjacent instances whether those instances have been found to be in specific sub-divisions or not, and that the instances cited are sufficient at least to shift the *onus* on to defendants. We do consider that the fact that *Chauhatta Mufti Bakar* is not a sub-division and has not been shown to be part of *Guzar Rarra* alters the principle of proof required under Section 11, Punjab Laws Act. That instances in other sub-divisions may by themselves be sufficient to support a claim is certainly contemplated by Plowden, J., in *Nonni Mal v. Sheo Nath* ⁽³⁾. But that view has been dissented from in later rulings, e. g., *Raman Mal v. Bhagat Ram* ⁽¹⁾ and *Natha Singh and others v. Billa Singh and others* ⁽⁴⁾ and recently by this Bench in Civil Appeal 526 of 1897, in which it was held that instances in other sub-divisions were at best supplementary proof. The latter is the principle which we would apply in the present case.

We do not propose to deal at length with the few instances cited. Two Courts have already dealt with those instances in some detail, and have arrived at the same conclusion, and no cogent reasons have been adduced to show us that the Courts have erred in their estimate of the value of the evidence.

The judicial precedents cited for the plaintiff of the right with regard to shops are confined practically to two cases of the Akbari *Mandi* and one of the Delhi *Darwaza*, as the Mochi *Darwaza* and Shahalmi *Darwaza* cases are admittedly too remote to support the plaintiff's claim. There was one instance cited by *Ram Kishen*, witness for plaintiff, as having occurred in *Wali Shah ka Katra* which appears on the map as opening on to the

⁽¹⁾ 17 P. R., 1895.

⁽²⁾ 48 P. R., 1888.

⁽³⁾ 64 P. R., 1887.

⁽⁴⁾ 58 P. R., 1900.

Chauhan Bazar, but the instance has not been ascertained by the production of any file, and the mere assertion is of little value.

Having regard to the distance disclosed by the map of the properties pre-empted in the Akbari *Mandí* and Delhi *Darwaza* cases from the property in this suit we think those cases go very little way towards establishing the alleged right.

The concurrent finding of the lower Courts on the point of custom we consider to be correct, and we dismiss the appeal with costs.

Appeal dismissed.

Full Bench.

No. 84.

Before Mr. Justice Clark, Chief Judge, Mr. Justice Chatterji and Mr. Justice Maude.

JHANGI RAM AND ANOTHER,—(PLAINTIFFS),—
PETITIONERS,

Versus

MUSSAMMAT BUDHO BAI,—(DEFENDANT),—
RESPONDENT.

REVISION SIDE. }

Civil Revision No. 1140 of 1900.

Arbitration—Award—Agreement to refer to arbitration—Application to file such agreement—Power of Court where there is a denial to the execution of such agreement—Competency of Court to enquire into objection denying validity of a reference to arbitration—Appeal—Appeal on grounds other than the decree being in excess of or not in accordance with the award—Civil Procedure Code, 1882, Sections 520, 521, 522, 523 and 525.

Held by the Full Bench :

- (i) That a Court is competent upon an application under Section 525, Civil Procedure Code, to file an award to enquire into and decide objections other than those specified in Sections 520 and 521 of the Code ;
- (ii) That Section 526 does not limit the enquiry allowed under Section 523, and that a Court is competent upon an application under that section to file the reference to arbitration in spite of defendant's denial of the agreement to refer ;
- (iii) That an appeal lies from an acceptance or rejection of an application under Section 525, Civil Procedure Code, when the award is illegal *ab initio*, and
- (iv) That an order rejecting an application under Section 523, Civil Procedure Code, is appealable.

Narain Das and another v. Manohar Lall and others ⁽¹⁾ overruled. *Ghulam Jilani Khan v. Muhammad Hassan* ⁽²⁾, *Hussaini Bibi v. Mohsan Khan* ⁽³⁾, *Surjan Raot v. Bhikari Raot* ⁽⁴⁾, and *Tejpur Dewchand v. Mahomed Jamal* ⁽⁵⁾, disapproved.

Mahomed Wahid-ud-din v. Hakimian ⁽⁶⁾, *Alma Ram v. Jamita* ⁽⁷⁾, *Ram Rattan v. Basakha Mal* ⁽⁸⁾, *Amrit Ram v. Dasrat Ram* ⁽⁹⁾, *Chintamallayya v. Thaddi Gangireddi* ⁽¹⁰⁾, *Kalli Prosanno Ghose v. Rajain Kant Chatterji* ⁽¹¹⁾, *Raja Harnarain Singh v. Chaudhrain Bhagwant Koer* ⁽¹²⁾, *Chuha Mal v. Hari Ram* ⁽¹³⁾, *Husananna v. Linganna* ⁽¹⁴⁾, *Gowdu Magata v. Gowdu Bhagwan* ⁽¹⁵⁾, *Saturjit Pertap Bahadar Sahai v. Dulhin Gulab Koer* ⁽¹⁶⁾, *Nandram Daluram v. Nemchand Jadavchand* ⁽¹⁷⁾, *Amir Hassan Khan v. Sheo Bakhsh Singh* ⁽¹⁸⁾, and *Cheto Mal v. Mahoo Mal* ⁽¹⁹⁾ cited.

Petition for revision of the decree of Lala Harnam Das, District Judge, Multan, dated 19th July 1900.

Madan Gopal, for petitioners.

Sangam Lal, for respondent.

The judgments delivered by the learned Judges who constituted the Full Bench were as follows:

CLARK, C. J.—The questions referred to the Full Bench are— 7th June 1901.

- (1). Whether a Court is competent upon an application, under Section 525, Civil Procedure Code, to file an award, to inquire into and decide objections other than those specified in Sections 520 and 521 of the Code.
- (2). Whether a Court is competent upon an application, under Section 523, Civil Procedure Code, to file the reference to arbitration in spite of the defendant's denial of execution of the agreement to refer.
- (3). Whether an appeal lies from a rejection or acceptance of an application under Section 525, Civil Procedure Code.
- (4). Whether an order rejecting an application under Section 523, Civil Procedure Code, is appealable or not.

⁽¹⁾ 21 P. R., 1898, F. B.

⁽²⁾ 74 P. R., 1894, F. B.

⁽³⁾ I. L. R., I All., 156.

⁽⁴⁾ I. L. R., XXI Calc., 213.

⁽⁵⁾ I. L. R., XX Bom., 596.

⁽⁶⁾ I. L. R., XXV Calc., 757.

⁽⁷⁾ 134 P. R., 1888.

⁽⁸⁾ 49 P. R., 1893.

⁽⁹⁾ I. L. R., XVII All., 21.

⁽¹⁰⁾ I. L. R., XX Mad., 89.

⁽¹¹⁾ I. L. R., XXV Calc., 141.

⁽¹²⁾ I. L. R., XIII All., 300.

⁽¹³⁾ I. L. R., VIII All., 548.

⁽¹⁴⁾ I. L. R., XVIII Mad., 423.

⁽¹⁵⁾ I. L. R., XXII Mad., 299.

⁽¹⁶⁾ I. L. R., XXIV Calc., 469.

⁽¹⁷⁾ I. L. R., XVII Bom., 357.

⁽¹⁸⁾ I. L. R., XI Calc., 6.

⁽¹⁹⁾ 4 P. R., 1882.

On the first question the Full Bench ruling of this Court, *Narain Das and another v. Manohar Lal and others* ⁽¹⁾ decides that the Court upon such objection being raised must stay its hand absolutely, and refer the applicant to a regular suit.

At that time there were opposed to this view two published rulings of this Court, *Atma Ram v. Jamita* ⁽²⁾ and *Ram Rattan v. Basakha Mal* ⁽³⁾ (referring to Section 523, Civil Procedure Code). The rulings of the High Courts of Allahabad and Madras (*Amrit Ram and another v. Dasrat Ram and others* ⁽⁴⁾), and *Chintamallayya v. Thaddi Gangireddi* ⁽⁵⁾).

In favour of the view were the opinions of three Judges expressed in the Full Bench decision of Calcutta, *Surjan Raot v. Bhikari Raot and others* ⁽⁶⁾, the question not being decided by the Bench, and the ruling of the Bombay High Court, *Tejpur Dewchand and another v. Mahomed Jamal and others* ⁽⁷⁾, and one unpublished ruling of this Court.

Since the Full Bench ruling of this Court was passed the question has been before a Full Bench of the Calcutta High Court, *Mahomed Wahid-ud-din v. Hakiman* ⁽⁸⁾, and they have held that the Court should enquire into the objections.

The Bombay ruling is thus now the only one in support of the Full Bench ruling of this Court. That was a ruling by Sir C. Farran, C. J., and Strachey, J.

It was passed prior to the Calcutta ruling, *Mahomed Wahid-ud-din v. Hakiman* ⁽⁸⁾, and relied to some extent upon the opinions expressed by the three Judges in *Surjan Raot v. Bhikari Raot* ⁽⁶⁾, overruled by the later ruling, and to a great extent upon the principle of *stare decisis* and followed the previous rulings of the Bombay Court.

Strachey, J., expressly saying that if the question were *res integra* he would be disposed to adopt the conclusion of the Allahabad High Court.

The state of the authorities then is that the ruling of this Court is opposed to the rulings of the High Courts of Calcutta, Madras and Allahabad, and is in agreement with the ruling of the Bombay High Court, but that ruling was based quite as much on the principle of *stare decisis* as on the merits of the question.

This Court is not bound by the principle of *stare decisis* because the ruling of 1898 was opposed to the previous published

(1) 21 P. R., 1898, F. B.

(2) 134 P. R., 1888.

(3) 40 P. R., 1893.

(4) I. L. R., XVII All., 21.

(5) I. L. R., XX Mad., 89.

(6) I. L. R., XXI Calc., 213.

(7) I. L. R., XX Bom., 596.

(8) I. L. R., XXV Calc., 757.

rulings of this Court. I understand Sir Charles Roe's arguments to be these—

1. The questions whether reference and award have been made raise difficult and complicated questions of law and fact, while questions under Sections 520 and 521 raise simple questions of fact.

The object of Sections 523—526 is to bring parties by a short cut and cheap method to a stage of a case which is ordinarily reached only after the institution of a suit, and it was not intended that these difficult questions should be gone into under these sections.

It seems to me that the question whether a reference has been made is a much simpler question than the question whether there has been misconduct of arbitrators or fraud by the parties. This is a view that has been expressed by many Judges of the High Courts (*e.g.*, Sir F. Maclean, C. J., in *Mahomed Wahid-ul-din v. Hakimian* ⁽¹⁾).

2. The next argument is that the plain wording of Section 526 limits the objections that can be put forward to those falling under Sections 520 and 521.

I agree with Sir Charles Roe that the view of the Allahabad High Court, that an objection that there has been no legal reference to arbitration is one falling under Section 520, cannot be supported. This view was not adopted by any of the Judges of the Calcutta Court, and was expressly dissented from by Strachey, J., in the Bombay case.

In a case coming under Section 520, the case has been referred to arbitration through the Court, and the question whether there had been a reference to arbitration could not arise.

But though I think this view cannot be adopted I think for other reasons that the wording of Section 526 does not bar an enquiry into objections other than those falling under Sections 520 and 521, Civil Procedure Code. Strachey, J., says:—"It appears to me that the effect of the Sections 525 and 526 read together is that, where there has been such a submission and award, any person interested in the award has an absolute right to have it filed, unless the other parties show against it some ground such as is mentioned in Sections 520, 521. The right to have the award filed, except where such ground is shown, depends exclusively upon the conditions specified in Section 525, a submission, an award, and an interest in the award, and cannot be

(¹) *I. L. R.*, XXV *Calc.*, 763.

“denied to any one who shows that those conditions exist.
“.. When once the submission and the award have been
“established by admissions or proofs, but not till then, the enquiry
“under Section 526 appears to me to be co-extensive with that
“under Section 522, in which the reference having been made by
“the Court itself at an earlier stage of the proceedings there can
“of course be no question as to its existence.”

This is the line of argument adopted by Sir Francis Maclean, C. J., in the Calcutta ruling, that the Court, under Section 525, must go into the questions whether the reference and award have been made, and that Section 526 does not bar this enquiry. Similarly Banerji, J., says: “The object of Section 526 is, in my opinion, not to limit the jurisdiction of the Court under Section 525 to cases in which reference to arbitration has been admitted, “but simply to provide that the only grounds upon which the “validity of a private arbitration award, made upon a reference “to arbitration either admitted or proved, can be questioned are “precisely those upon which an award made on a reference to “arbitration in the course of a suit can be called in question: or, “in other words, its object is to show that the validity of a private “arbitration award cannot any more than that of an award made “on a reference to arbitration in the course of a suit be questioned “on the ground of the award being erroneous in fact.” I have no difficulty in holding that the wording of Section 526 does not bar an enquiry into the fact whether the reference and award have been made.

Granting that the plain meaning of the words of an Act must be followed, it is beyond the capacity of human intelligence to foresee and provide in a statute for all the complications and contingencies that may arise: it is equally beyond the capacity of human language to express its intention so as to make misunderstanding impossible.

It is within the function of the Courts to bring a liberal mind to the construction of a statute where it has to be applied to an unforeseen contingency, or where the bald literal meaning and the spirit of the statute are at variance.

An absolutely literal reading of Section 526 would lead to the absurd conclusion that the award *must be filed* where an objection has been taken that there has been no reference and no award, these not being objections under Sections 520 and 521, and is impossible.

When two meanings are possible, and one brings about a result opposed to the other provisions and spirit of the statute,

and the other brings about a result in accordance with those provisions and the spirit of the Act, Courts are justified in adopting the former meaning, even though the latter meaning is on the face of it the more plain of the two.

In my opinion Section 525 refers to one set of circumstances, namely, whether there has been a reference and an award, and Section 526 to another set of circumstances, where it has been established that there has been a reference and an award, and that it is intended to prevent that award from being challenged except on grounds on which an award filed in the course of a suit could be challenged.

Section 526 therefore does not limit the enquiry to be made under Section 525, Civil Procedure Code.

3. Sir Charles Roe's next argument is that as in the proceedings under Section 506 and following sections the Court could not enquire into the existence of the agreement to refer therefore it could not do so under Sections 523—526.

But in the proceedings under Section 506 and following sections the reference to arbitration is through the Court, and it is difficult to see how the question could arise.

4. The next argument is, that there is not much force in the argument that the defendant by raising any unfounded objection not falling under Sections 520—521 could render Sections 523—526 inoperative, because the defendant if his objections were unfounded would be penalized in costs in the regular suit that would be brought in such case by plaintiff.

But no suit could apparently be brought in a case coming under Section 523, as the Specific Relief Act would bar such a suit when there was an agreement to refer to arbitration.

Both Sir F. Maclean, C. J., and Strachey, J., have discussed this question, and think that it can hardly have been the intention of the Legislature to allow the object of Sections 523—526 to be defeated by a mere allegation, however baseless, and I agree in their view.

5. The next and last argument is that there would be a glaring inequality in the position of the parties as, if the objection were allowed, plaintiff would have a further remedy by a regular suit, whereas, if it were disallowed, defendant would have no remedy, as he had no right of appeal.

As I shall hold later on in this judgment that the defendant has a right of appeal, I need not further discuss this argument.

On a full consideration of the Act and the authorities I would answer the first question referred by saying that a Court is competent, upon an application under Section 525, Civil Procedure Code, to file an award, to enquire into and decide objections other than those specified in Sections 520, 521 of the Code.

As regards the second question, whether a Court is competent upon an application under Section 523, Civil Procedure Code, to file the reference to arbitration in spite of defendant's denial of the agreement to refer, I would answer that the Court is competent. The arguments used in answering the first question are applicable also to this question, and the answer in this case is simpler than in the former case, because Section 526 does not limit the enquiry allowed under Section 523.

This furnishes an additional argument for the enquiry as to the factum of reference being allowed under Section 525, because if it is allowed under Section 523, there is no ground for its not being allowed under Section 525.

The third question referred is, whether an appeal lies from a rejection or acceptance of an application under Section 525, Civil Procedure Code.

As under Section 526 the previous provisions of the Chapter are made applicable to awards filed under this section, the question arises *when the award has been filed* under Section 526 whether Section 522 does not bar an appeal except in so far as the decree is in excess of or not in accordance with the award?

When the application has been rejected under Section 525 the question does not arise. It is, however, necessary to decide the question whether Section 522 bars the appeal with reference to cases where the award has been filed under Section 526.

Full Bench ruling of this Court, *Ghulam Jilani Khon v. Muhammad Hussain* (1), rules that it is only where it is alleged that the decree is not in accordance with or not in excess of the award that an appeal lies, and that an appeal lies in no other case.

This view as pointed out by Rivaz, J., was opposed to the view of all the High Courts then, and it is opposed to the subsequent decisions of the High Courts.

I may notice in passing one unfortunate consequence of occupying an isolated position of this kind is that the situation is not likely to be altered by an amendment of the law. Where there is a consensus of decision, and that decision is opposed to the inten-

(1) 74, P. R., 1894.

tion of the Legislature, there is a probability of the law being amended.

Here the decision of our Court is opposed to the intention of the Legislature as interpreted by all the High Courts, and yet owing to our isolated position, the inconvenience is not likely to be removed by a change of the law.

This, however, is a consideration which cannot affect the interpretation of the Act.

The *ratio decidendi* of the Full Bench ruling of 1894 is that the plain language of Section 522 bars an appeal except so far as the decree is in excess of or not in accordance with the award.

I have in a previous part of this judgment explained what I take to be the duty of a Court in interpreting a statute.

According to my view the principle governing the right of appeal in arbitration cases is that when persons have referred or agreed to refer matters to arbitration, and the arbitrators have honestly and properly decided these matters, that their decision is final. This is a principle similar in kind to the enforcement of a contract, it requires that parties shall be bound by what they agreed shall bind them, and commands general acceptance.

But when the question is whether there has or has not been any reference to arbitration: or any award thereupon: or any misconduct by the arbitrators: or any fraud by the parties: the principle above stated has no application whatever.

There is then only for decision ordinary issues of law or fact, such as arise in ordinary suits, and I can see no reason why the ordinary right of appeal should be taken away.

The view taken by the High Courts is that the word "award" in the last clause of Section 522 means a legal award, and not an award which was illegal and void *ab initio*, and I feel no difficulty in accepting this view. Whether an appeal lies when the award is impugned on grounds coming within Sections 520 and 521, is a question of great difficulty, and one on which different views have been held at divers times by the High Courts. *Kali Prosanno Ghose v. Rajani Kant Chatterji* ⁽¹⁾ appears to take the wider view of appeal which I am disposed to favour. It is not, however, necessary to decide the question on this reference, here it is sufficient to hold that an appeal lies when the award is illegal *ab initio* for that does not come under the terms "in excess of" or "not in accordance with the award."

(1) I. L. R., XXV Calc., 141.

I would, however, note that in *Raja Harnarain Singh v. Chandhrain Bhagwant Koer* ⁽¹⁾, a Privy Council case in which an appeal had been heard by the High Court, Allahabad, as to the validity of the award under Section 521, the Privy Council accepted the appeal, and held that the award was not valid as not made within the time fixed by the Court (Section 521), set it aside, and ordered the case to proceed. The Privy Council in that case also approved of *Chuha Mal v. Hari Ram* ⁽²⁾, where an appeal had been heard under similar circumstances.

The question whether an appeal lay or not was not raised in either the High Court or before the Privy Council, but the appeal was entertained in both Courts.

Rivaz, J., in *Ghulam Jilani Khan v. Muhammad Hassan* ⁽³⁾ after referring to all the judgments of the High Courts against his view says: "All the above cases appear to proceed on the assumption that the term award as used in the final clause of Section 522, Civil Procedure Code, must be construed as meaning a legal or valid award. No one of the cases directly discusses the question whether the real intention of the Legislature is not that Section 522 should be read literally and Section 622 resorted to where some of the defects and irregularities adverted upon, require to be looked into and remedied."

It is true that there might be a remedy by revision where the award was invalid *ab initio* on the ground that the Court had exercised a jurisdiction not vested in it by law. But we cannot suppose that the Legislature intended, while refusing appeal to give the same rights in the shape of revision; and where a Court has wrongly decided the question of misconduct of arbitrators or fraud of parties under Section 521, there can be no interference on the revision side, however erroneous the decisions, unless there had been some material irregularity. If the Court had understood the objections, enquired into them, and decided them, the decision is final.

The remedy by revision does not seem to meet the requirements of the case, and gives a finality to the decision of the first Court on questions on which finality cannot be justified on any principle on which the decision by arbitration is made final.

A further argument against the remedy being by revision alone is that this remedy brings every case, however small, direct to the High Court, neglecting the consideration that in the ordinary course the remedy would be by appeal to an inferior Court.

⁽¹⁾ I. L. R., XIII All., 390. ⁽²⁾ I. L. R., VIII All., 515.

⁽³⁾ 74, P. R., 1894.

I differ then from the ruling in *Ghulam Jilani v. Muhammad Hussan* ⁽¹⁾ and hold that an appeal does lie on grounds other than the decree being in excess of, or not in accordance with, the award.

It is next argued that the order under Section 525 is not a decree, and is not appealable under Section 540, Civil Procedure Code, and is not appealable as an order under Section 588, Civil Procedure Code.

This question has been fully discussed in *Saturjit Pertap Bahadur Sahi v. Dulhin Gulab Koer* ⁽²⁾ and *Husananna v. Linganna* ⁽³⁾, and *Gowdu Magata v. Gowdu Bhagwan* ⁽⁴⁾, and for the reasons there given I hold that the order is a "decree" and appealable.

I will give a common instance of what might be the effect of not allowing an appeal from an order to file an award under Section 526.

A decree might be passed for any sum of money, the arbitrators might have been bribed, or the parties might have practised fraud on them, the Court might have erroneously or corruptly decided that there had been no misconduct or no fraud. Such decisions could not be interfered with on revision. Such decisions would be final if there was no appeal. It is difficult to think that the Legislature intended to deny all remedy in such circumstances.

My answer to question 3 is that in accordance with *Muhammad Wahid-ul-din v. Hakimian* ⁽⁵⁾, *Saturjit Pertap Bahadur Sahi v. Dulhin Gulab Koer* ⁽²⁾, *Nandram Daluram v. Nemchand Jadurchand* ⁽⁶⁾, *Husananna v. Linganna* ⁽³⁾, and the opinion expressed in *Amrit Ram v. Dasrat Ram* ⁽⁷⁾, an appeal lies from an acceptance or rejection of an application under Section 525, Civil Procedure Code.

Question 4 is "Whether an order rejecting an application "under Section 523, Civil Procedure Code, is appealable or not," and for reasons given in answering question 3, I hold that it is appealable.

CHATTERJI, J. —I concur with the view of the learned Chief Judge on the first and second questions, taking the order laid down in his judgment. As they have been most exhaustively dealt with by him I do not think it necessary to give my reasons in detail. 10th June 1901.

(1) 74, P. R., 1894.

(2) I. L. R., XXIV Calc., 469.

(3) I. L. R., XVIII Mad., 423.

(4) I. L. R., XXII Mad., 299.

(5) I. L. R., XXV Calc., 757.

(6) I. L. R., XVII Bom., 357.

(7) I. L. R., XVII All., 21.

With reference to Section 523, Civil Procedure Code, I am disposed to think that the remarks about it contained in *Narain Das v. Manohar Lal* ⁽¹⁾ were due to inadvertence. The question was not referred to the Full Bench, and the previous authorities of this Court bearing on it were in favour of the Court having a plenary power to consider all manner of objections to the filing of the agreement. The argument used about the applicant being able to institute a regular suit which applies only to awards bears out my impression. *Atma Ram v. Jamita* ⁽²⁾, and *Ram Rattan v. Basakha Mal* ⁽³⁾ are in support of the view that the Court is competent to go into and decide objections raised by the party opposing the filing of the agreement, and is not compelled to throw out the application, because the execution of the agreement is not admitted or its validity or correctness is impugned. In fact applications under Sections 523 and 525 though analogous in many respects do not stand exactly on the same footing. There is no section like Section 526 applicable to the former, and there is no other remedy for the applicant. To hold that the mere alleging of certain grounds of objection to the filing of the agreement must necessarily lead to the rejection of the petition would reduce Sections 523 and 524 to a dead letter, and place the petitioner at the mercy of his opponent. The provisions of these sections would be a farce and become a mere trap for litigants to waste their time and money on applications of this nature. There is no weight of authority in favour of the construction put on Section 523 by the Full Bench in 1893, and I have no difficulty in holding that such a construction is erroneous, and that when cause is shown by a party against the filing of an agreement to refer to arbitration under Section 523, the Court's jurisdiction is not at once ousted, but it has full power to inquire into the objections and to decide whether they are correct or otherwise.

As regards Section 525. The arguments in respect of Section 523 to a great extent apply to it also. I have no desire to repeat the reasoning of the Calcutta High Court in *Muhammad Wahid-ud-din v. Hakimian* ⁽⁴⁾ and of the learned Chief Judge, but I have no doubt that Section 525 stands by itself, and is not controlled by Section 526, and that the Court has full power to decide whether the conditions mentioned in the former section as requisite for the entertainment of an application under it exist or not, and is not precluded from doing so by the mere denial of the opposing party. In *Narain Das v. Manohar Lal* ⁽¹⁾ the section was read as if it

⁽¹⁾ 21, P. R., 1898.

⁽³⁾ 49, P. R., 1893.

⁽²⁾ 134, P. R., 1888.

⁽⁴⁾ I. L. R., XXV Calcutta, 757.

ran: "When it is *admitted* that a matter has been referred to "arbitration, &c." *vide* remarks of Spankie, J., in *Hussaini Bibi v. Mohsan Khan* ⁽¹⁾. The last was a case under Section 327, Act VIII of 1859, so that the controversy is of old standing, and it is difficult to understand that if this had been the intention of the Legislature words to that effect would not have been used. The plain meaning of the words appears to me to be that the Court has authority to see whether the conditions provided in the section exist or not, and before accepting the contrary view I should require clearer indications that the true intention was different from what the actual words primarily convey. Section 526, as shown in the Calcutta judgment, is meant to come into play when the Court finds that the conditions required in Section 525 are fulfilled, and applies only to the award. A literal construction of it leads to the absurd conclusion pointed out by the learned Chief Judge which is just the reverse of what is contended for by those who support the restricted scope of Section 525. I have on the whole no difficulty in accepting the view of the learned Chief Judge with respect to Section 525, and with him would reply to the first and second questions in the affirmative.

In taking up the consideration of the third and fourth questions I approach more debateable ground, and find considerable difficulty in coming to a conclusion with any degree of confidence. I propose to consider the subject matter of these questions under two heads—(1) whether a decree passed under Sections 525, 526, Civil Procedure Code, is appealable, and (2) whether orders rejecting applications to file a reference to arbitration under Section 523 or an award of private arbitrators under Section 525 are open to appeal? Decrees falling under the first head substantially stand on the same footing in respect to appeal as decrees passed on awards given on a reference to arbitration in Court. Under this head will also fall decrees passed on awards given on a reference made a rule of Court under Section 523 on the application of a party, though this point has not been referred to this Full Bench. There is no doubt that there is no essential difference between decrees passed on successful applications under either of the two sections. This may also be affirmed of orders rejecting applications under either section.

Now as regards appeals lying from decrees based on awards given in Court. The right of appeal was held to be barred except as to the points specified in Section 522, Civil Procedure Code, by the Full Bench decision of this Court, *Ghulam Julani Khan v. Mu-*

(¹) *I. L. R., I All.*, 156.

hammad Hussan ⁽¹⁾. Sir Meredyth Ployden delivered a very learned judgment on that occasion, the reasoning of which was implicitly accepted by his brother Judges. I always feel great diffidence in advancing an opinion opposed to that of the late learned Senior Judge, but in this instance I have the support of all the High Courts in India, and possibly the tacit approval of their Lordships of the Privy Council. That all the High Courts allow an appeal from a decree based on an award of arbitrators on grounds extraneous to the award was pointed out by Mr. Justice Rivaz who ultimately gave his adhesion to the view of the Senior Judge on the ground that the judgments quoted by him did not discuss the question whether the intention of the Legislature in framing the stringent wording of Section 522, Civil Procedure Code, was not that that section should be read literally and Section 622 resorted to where defects and irregularities in the reference on the arbitration proceedings require to be remedied.

Since the date of the Full Bench decision other decisions have been pronounced by the High Courts on the question under consideration in which the same view has again been affirmed, *e.g.*, the Full Bench judgment of the Madras High Court in *Husananna v. Linganna*, ⁽²⁾ *Saturjit Pertap Bahadur Sahi v. Dulhin Gulab Koer* ⁽³⁾. I confess also that the argument as regards resort to Section 622, Civil Procedure Code, for redress of defects and irregularities does not strike me as convincing. For example, suppose the party dissatisfied with the award objects that the reference was made without authority, or that his consent was obtained by fraud, or that the arbitrators were deceived, and the Court decides against the objector, I am unable to see how the High Court can give him relief under Section 622, particularly after the interpretation put upon the scope of that section by their Lordships of the Privy Council in *Amir Hassan Khan v. Sheo Bakhsh Singh* ⁽⁴⁾. The marked change in the language of Section 522 of the present Code from that of Section 325 of Act VIII of 1859 may indicate a new departure on the part of the Legislature, and this argument of the late Senior Judge is of great force and deserves careful consideration, but it stands almost by itself and derives little strength from that about the increase of the powers of revision of High Courts under Section 622 as compared with those possessed by them under Section 35 of Act XXIII of 1861.

The principle underlying the judgments of the High Courts which hold that an appeal from a decree based on an award of

⁽¹⁾ 74, P. R., 1894.

⁽²⁾ I. L. R., XVIII Mad., 423.

⁽³⁾ I. L. R., XXIV Cal., 464.

⁽⁴⁾ I. L. R., XI Cal., 6.

arbitrators under Chapter XXXVII of the Code is allowable on grounds extraneous to the award appears to be that Section 522 is meant merely to lay down that there can be no interference on appeal with decrees based on awards on the merits, except within the limits mentioned in that section. This rule applies to private awards whether pleaded in bar of a claim, or made the basis of one. It is certainly difficult to say why the change was made, and it is not permissible to look to the debates in the Legislative Council, the statements of objects or reasons or the reports of select committee for an explanation. But as very pertinently pointed out by Mr. Justice Subramania Ayyar in *Husmanna v. Linganna* ⁽¹⁾, if a regular suit is brought on the award the decree though in accordance with the award is appealable on such grounds as that there was no submission to arbitration or valid award, though there can be no interference with the subject matter of the arbitrator's decision if the award otherwise holds good, and there is no apparent reason why a person who in a proceeding under Section 523 has a decree passed against him in accordance with a private award should be placed in a different position. I can conceive of none, and the argument applies with equal force to decrees based on awards made in references to arbitration through Court in a pending suit. If the language of Section 522 does not absolutely forbid it, decrees under Chapter XXXVII of the Code should be placed on the same footing as decrees on awards in a regular suit. There is no essential distinction *in this respect* between the two and no sound reason for making the difference, whereas it would lessen the unpopularity of proceedings under the Chapter with sniters and facilitate resort to the shorter and less expensive procedure under Sections 523 and 525 if the distinction is obliterated.

The wording of Section 522 does not absolutely preclude the reading I have put on it, and there is a great preponderance of authority in support of it. The reading adopted by the last Full Bench which I may observe was contrary to the opinion of a previous Full Bench, see *Cheto Mal v. Mahoo Mal* ⁽²⁾, places litigants in proceedings under Chapter XXXVII in a more disadvantageous position than those in other provinces. I should be disposed to interpret the section in accordance with the construction put on it in other parts of India and restore that which was in vogue in this province itself before the judgment in *Ghulam Jilani Khan v. Muhammad Hussan* ⁽³⁾ was passed. I agree with the learned Chief Judge that it is a distinct disadvantage to

(1) *I. L. R.*, XVIII *Mad.*, 423.

(2) 4, *P. R.*, 1887.

(3) 74, *P. R.*, 1894.

occupy an isolated position in matters of this kind, though I do not, of course, for a moment mean that we should be led by any such consideration to blink the plain language of the Legislature. I am also disposed to think that this view can be fairly assumed to have the indirect support of their Lordships of the Privy Council. Section 521, Civil Procedure Code, lays down that no award shall be valid unless filed within the time fixed by the Court. This, however, is not a ground mentioned in Section 522, or one on which, if the reading of it by the Full Bench of 1894 is correct, an appeal can be allowed. In *Chuha Mal v. Hari Ram* ⁽¹⁾ the District Judge of Farrukhabad entertained an appeal on this ground, and an appeal was filed from his order reversing the decree of the first Court based on this award in the High Court of the N.-W. P. The learned Judges entertained the appeal and dismissed it holding District Judge's view to be correct. In *Raja Har Narain Singh v. Chaudhrain Bhagwant Koer and another* ⁽²⁾ there was a similar defect, but the High Court after entertaining an appeal held that it had been cured. There was a further appeal to the Privy Council, and their Lordships decided that the objection was fatal, and quoted the judgment first cited with approval. The question of an appeal lying under Section 522 was no doubt not before their Lordships, but they must have been cognizant of that section and of the fact that decree of the first Court had been set aside on appeal. I therefore would regard this judgment as affording an indication that their Lordships did not regard an appeal from a decree on an award as obviously inadmissible under that section. We are told that the question is now before their Lordships, and I should have been very glad to wait for their judgment had we possessed any information about the date of hearing.

I would thus hold a decree passed on an award made on a reference in Court in a pending suit or in an application under Section 523 or filed in Court under Sections 525, 526 as appealable, Section 522 notwithstanding, on grounds impeaching the reference or the legality of the award, or in other words, extraneous to the award. It is not absolutely necessary here to decide whether grounds of misconduct or corruption of the arbitrator and the like can come within the scope of the appeal, but I am disposed to think that they are if my reading of the true import of Section 522 is right, as they certainly can be urged in an appeal in a regular suit. I see no reason why suitors of both classes should not be placed on the same level, and it is most expedient that they should be.

⁽¹⁾ I. L. R., VIII All., 548. ⁽²⁾ I. L. R., XIII All., 300.

Coming now to the second head, I am of opinion, on the whole, that orders rejecting applications under Sections 23 and 525 are appealable. These applications involve two things—(1) a prayer that a particular mode of investigation, *i.e.*, of procedure, may be adopted, and (2) that a substantive right in issue between the parties may be decided in this manner. The adjudication is in the first instance confined to the question of procedure, and therefore the rejection of the application may be said not to be a decree; but the definition of decree in Section 3 cannot be said to exclude the final order passed in such cases, and both sections provide that the application shall be registered as a suit between the parties. The view I have generally taken above about proceedings under Chapter XXXVII and regular suits on awards indirectly favours appeals in cases of this kind also, and if an appeal is not allowed to the unsuccessful applicant under Section 523 he is without a remedy, and loses a valuable right to have a dispute settled in an expensive and expeditious manner. The latest authorities, *e.g.*, *Muhammad Wahid-ud-din v. Hakimian* ⁽¹⁾ and *Gowdu Magata and another v. Gowlu Bhagwin and others* ⁽²⁾ are in favour of this view, and I am prepared to follow them.

I would accordingly answer all the questions referred to the Full Bench in the affirmative.

MAUDE, J.—I fully concur that all the questions referred 12th June 1901. should be answered in the affirmative. The points so exhaustively examined in the foregoing judgments appear to me to admit of no other solutions than those arrived at.

No. 85.

Before Mr. Justice Chatterji and Mr. Justice Maude.

ZARIF KHAN,—(PLAINTIFF),—APPELLANT,

Versus

AMIR KHAN AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 631 of 1897.

Custom—Inheritance—Pathans of Desa in the Chach ilaqa of the Rawalpindi District—Special family custom—Burden of proof.

Held, that a party relying upon a special family custom, such as that only one son of the last owner, *viz.*, the fittest or the eldest, succeeds to the whole estate, the others getting only maintenance, must prove that such custom was ancient, invariable and definite.

⁽¹⁾ I. L. R., XXV Calc., 757.

⁽²⁾ I. L. R., XXII Mad., 299.

Held, on the evidence, the acts, of the principal defendant, the manner of succession to the estate, and the shares enjoyed by members of the family at different times, that such custom even if it was once in force, has been abrogated or abandoned, and that the family was bound by the ordinary rule of inheritance, i. e., equal succession of all the sons.

Ramalakshmi Ammal v. Sivanantha Perumal Sethuroyar ⁽¹⁾, *Bhau Nanaji Utpat v. Sundrabai* ⁽²⁾, *Raj Kishen Singh v. Ramjoy Surma Mazoomdar* ⁽³⁾, *Jotala Bakhsh v. Dharam Singh* ⁽⁴⁾, and *Hakim Khan v. Gul Khan* ⁽⁵⁾, followed.

First appeal from the decree of W. Chevis, Esquire, District Judge, Rawalpindi, dated 22nd February 1897.

Madan Gopal, for appellant.

Harris, for respondents.

The facts are sufficiently given in the judgment of the Court, which was delivered by

13th May 1901.

CHATTERJI, J. (MAUDE, J., *concurring*).—The parties in this case are Pathans of Desa in the Chachh ilaga of the Rawalpindi District. Genealogical trees showing their relationship *inter se* and other members of the family are given on pages 9, 11 and 42 of the printed paper book. Defendants Nos. 1 to 7 and 9 are descended from Muhammad Khan. Defendant No. 8, Samandar Khan, is Muhammad Khan's brother's son, while Nos. 10 and 11 are carpenters who are said to have got some land by gift from the principal defendant No. 1, Amir Khan. The rights of the last three are not in dispute in this Court. Samandar Khan got one-sixth share of the entire land entered in Muhammad Khan's name by gift from him in 1870, and the plaintiff does not challenge it, but claims only one-sixth of the whole, and not one-fifth, which he would be entitled to if the entire property is treated as belonging to Muhammad Khan at the time of his death.

The plaint alleges that the whole land is still joint, that in 1886, on the death of Muhammad Khan, Amir Khan and the other defendants entered into an agreement to the effect that the former would retain possession for life of the five-sixth share that remained to the deceased after the gift, each of his brothers maintaining himself on the produce of 20 *bighas* of land to be set apart for him, and that plaintiff, then a minor, was no party to the said agreement, and, after reciting certain gifts made out of his share by defendant No. 1 in favour of defendants Nos. 9, 10 and 11, which are said to be invalid, but are not the subject of this suit, winds up

⁽¹⁾ 14 Moo. I. A., 570.

⁽³⁾ I. L. R., I Calc., 186 P. C.

⁽²⁾ 11 Bom. H. C. R., 249.

⁽⁴⁾ 10 Moo. I. A., 511, 537.

⁽⁵⁾ I. L. R., VIII Calc., 826.

by claiming possession of 1,118 *kanals*, 3 *marlas* of land, the deficiency in plaintiff's one-sixth share, he having 110 *kanals*, 4 *marlas* already in his possession.

Samandar Khan, defendant No. 8, disclaimed any interest in the suit. Khoshal Khan, for himself and as guardian *ad litem* of defendants Nos. 6 and 7, admitted the claim. Defendants Nos. 2, 3 and 4 appear not to have entered appearance in the first Court. The real defendant was Amir Khan, the eldest son of Muhammad Khan, who pleaded that the whole property left by his father descended to him by family custom, the other sons being merely entitled to maintenance, and that the agreement of 1886 was for plaintiff's benefit, and he should therefore be held bound by it, but that if he was not, it was not binding on Amir Khan also, and plaintiff could only take maintenance and not a share.

The Court below, the District Judge of Rawalpindi, fixed three issues. The last was whether the suit is barred by the decision of Sardar Balwant Singh, Additional District Judge, dated 17th December 1891, in a suit between the parties. This was found in plaintiff's favour, and the question is not raised again in this Court. As regards the two other issues the Judge found that the parties are governed by a special family custom under which the eldest son, or the fittest, succeeds to the whole estate, the others getting only maintenance, and that plaintiff is not entitled to the share claimed. He accordingly dismissed the suit.

The plaintiff contends on appeal that the custom is not proved on the evidence, and is besides not certain and ancient according to defendants' own showing.

According to the *Patwari's* statement, the descendants of Fattch Khan, brother of Nur-ulla Khan, father of Muhammad Khan, hold about 275 *kanals*, 19 *marlas* of land, of Nur-ulla Khan's descendants, the grandsons of his son Habib Khan, have 275 *kanals*, 6 *marlas*, the sons of Shah Nawaz Khan 128 *kanals*, 13 *marlas*, those of Arsala Khan 152 *kanals*, 19 *marlas* excluding the gift to Samandar Khan, and the sons of Sharif Khan 187 *kanals*, 16 *marlas*. The *Patwari* also deposes that the descendants of Ilam Khan, brother of Nur-ulla Khan's grandfather, hold only 2 *ghumars*, 1 *kanal*, 10 *marlas*. Muhammad Khan had 7,370 *kanals*, 2 *marlas* recorded in his name in the Regular Settlement.

The parties are Muhammadan agriculturists of Western Punjab, and the ordinary rule of inheritance among them is that of equal succession of all the sons. The custom set up is a special family custom. It is incumbent therefore on Amir Khan to prove

that the custom is ancient and invariable by clear and unambiguous evidence. "It is only by means of such evidence," remarked their Lordships of the Privy Council in *Ramalakshmi Ammal v. Sivanantha Perumal Sethuroyar* ⁽¹⁾, "that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends." See also *Bhau Nanaji Utpat v. Sundrabai* ⁽²⁾, and the cases therein cited. In *Raj Kishen Singh v. Ramjoy Surma Mazoomdar* ⁽³⁾, their Lordships said: "It is of the essence of family usages that they should be certain, invariable and continuous." These are cases among Hindus, but the principles laid down are of general application. Indeed among Muhammadans, if strict Muhammadan Law were followed, there would be more difficulty in proving a custom in derogation of the law. *Jowala Baksh v. Dharam Singh* ⁽⁴⁾, *Hakim Khan v. Gul Khan and others* ⁽⁵⁾.

The evidence in this case is meagre and does not extend beyond the time of Muhammad Khan. What is said about the history of the family before it is at best vague tradition, as none of the witnesses who depose to it is sufficiently old to be able to say anything from personal knowledge. In fact the only witness who attempts to give any evidence on the subject is the defendant Amir Khan, who must be speaking from hearsay, and whose evidence must of course be received with caution. There is no ancient document throwing light on the affairs of the family before Muhammad Khan. The oral evidence is quite insufficient to prove anything definite in favour of Amir Khan's contention.

The litigation that has taken place from time to time among members of the family from 1862 to 1891 makes it clear that Muhammad Khan got the bulk of the family property and claimed to do so as Khan, and asserted that this was the family custom. The lower Courts repeatedly held that this custom was established, and decided in Muhammad Khan's favour on that ground, but, as the District Judge points out, the Chief Court steadily refused to come to any such finding. In the last order they passed, *viz.*, on 11th December 1893, they studiously refrained from expressing any opinion on the question. In the case of 1876 between Mansur Khan, &c., plaintiffs, and Muhammad Khan, defendant, Mr. Perkins, the Commissioner of Rawalpindi, found that the custom was not established, as it was not shown "to be ancient or invari-

⁽¹⁾ 14 Moo. I. A., 570.

⁽³⁾ I. L. R., I Calc., 186.

⁽²⁾ 11 Bom. H. C. R., 249.

⁽⁴⁾ 10 Moo. I. A., 511, 537.

⁽⁵⁾ I. L. R., VIII Calc., 826.

“able, but rather the reverse,” though he also gave reasons for holding it invalid. In the Chief Court the plaintiffs’ suit was dismissed on different grounds by the Judges composing the Bench which heard the appeal, Mr. Justice Lindsay holding that plaintiffs had no cause of action during Muhammad Khan’s lifetime, and Mr. Justice Campbell that the claim was barred by Muhammad Khan’s adverse possession. It is true that Arbab Lashkar Khan, Extra Assistant Commissioner, who first tried the case, found in favour of the custom set up by Muhammad Khan, but this was not upheld by either Judge. The other cases are summarized in the judgment of the District Judge, but in none of them was a binding decision given as to custom, though, as already stated, expressions of opinion in its favour occur in almost all the judgments. In *Jafar Khan, &c. v. Amir Khan, &c.*, decided by the Deputy Commissioner and Settlement Officer, Rawalpindi, on 2nd January 1863, the brothers of Muhammad Khan and certain other members of the family were ranged on his side and the Court dismissed the plaintiffs’ claim to ancestral share, but the finding is not quite clear as regards the custom, and it cannot in any case conclude the question as between the parties to this suit.

There are also the statements of Muhammad Khan in the case of 1862-63 and the deposition of Mir Hamza in 1883 in the Court of *Pandit Thakar Das*, Extra Assistant Commissioner, in the suit of *Mansur Khan, &c.*, against *Amir Khan, &c.* But in my opinion these statements are not admissible in evidence. Section 32 (4) of the Evidence Act does not apply to them because (1), the matter they refer to is not one of public or general interest, as it affects a single family, and (2) they were not in any case made before the controversy arose. Muhammad Khan was merely deposing in support of his sole right under the custom against members of the family claiming shares under the ordinary rule of inheritance. As regards Mir Hamza he also gave evidence in a dispute substantially of the same kind as is involved in the present suit. The decisions in the previous cases are admissible as evidence of custom under Section 13 of the Evidence Act, but their value and bearing has already been discussed.

We have it from the statement of the *Patwari* and the entries in the Revenue Record that the descendants of Nur-ulla Khan have various quantities of land in their possession, though in every instance such land is very much less than that held by Muhammad Khan. It would seem that at one time the whole land of the family was joint, and that the other members have had their several portions divided off from Muhammad Khan. See judgment

of *Pandit* Thakar Das, page 24 of the printed paper book, in which the records of these partitions are mentioned. These records, so far as they go, do not support the case set up by Amir Khan, *viz.*, that only one son of the last owner, *viz.*, the fittest or the eldest, succeeds to the whole property and gives maintenance to the other sons and their descendants, but rather goes some way to show that the former gets the bulk of the inheritance and the latter small fractions.

Again, Habib Khan was the eldest son of Nur-ulla Khan, but there is no rational explanation why he was passed over in favour of Muhammad Khan. Najim Khan, son of Habib Khan, was the first to come to British territory after the downfall of the Sikh monarchy and to claim the family inheritance. He stated in a suit brought by Sadulla Khan against him that he was acting as agent for his uncle Muhammad Khan. He died soon after, and Muhammad Khan coming to the village was appointed *Lambardar* and got possession of the family lands. It is quite as probable that Muhammad Khan having become a person of repute and influence in foreign territory, Najim Khan thought that a claim backed by his name would receive more consideration from the British authorities, their rule being recently established, than one preferred on his own behalf, as that under family custom Muhammad Khan became the head somehow and Najim Khan in making his statement merely recognized this fact.

It is also conceivable that in a time of trouble, when there was no strong and well-ordered government to rule over the country, the family had to hold together, to combine their possessions and resources, and to be led by the most capable man among them. This would not necessarily create a custom of devolution of property in the family enforceable in a Court of law when a regular and orderly Government capable of affording adequate protection of life and property has been established. The remark would be still more true in the case of a ruling Chief, as Nur-ulla Khan was said to be in the Sikh times. The rules of succession to chiefship do not necessarily govern the devolution of private property in a Chief's family. It must be shown that such property has been subject to the same rules for a sufficient length of time and without variation before these rules can be accepted as binding in a Court of law. In this case there is evidence at best of Muhammad Khan having had possession, but the ground of his succession is not at all made clear.

The custom set up is also not an invariable or a definite one. The District Judge says that the custom was not *primogeniture*

pure and simple, but that regard was paid to fitness also, and more to it than primogeniture in troublous times. This is how he would account for the succession of Muhammad Khan. Muhammad Khan also in his statements in 1863 said something to the same effect, and admitted that his sons might be passed over in favour of others if not fit. It is not possible for a Court of law to make a selection on these principles and to give effect to a custom so lacking in definiteness.

Another point to be borne in mind is that the family is not shown to be an important or ancient one : nothing is known before Nur-ulla Khan's time, and definite information is available only after the return of Muhammad Khan to British territory, which took place less than fifty years ago. It is unusual to find a special custom regulating the law of inheritance in such a family under such circumstances.

It is further a fact damaging to the defendant's case that on the death of Muhammad Khan he entered into an agreement with his brothers that he would hold possession for life, giving them small quantities of land for maintenance, and that on his death they would divide the estate in equal shares. This greatly weakens the probative force of his evidence, feeble and indefinite as it otherwise is.

It was laid down by their Lordships of the Privy Council in *Raj Kishen Singh v. Ramjoy Surma Mazoomdar* ⁽¹⁾ that assuming the custom to have existed once, it was capable of being put an end to or of falling into disuse. The manner the land in dispute has been held since 1886 appears to show that the custom, if it was once in force, has been abrogated or abandoned. The defendant obtained possession over the whole only, by virtue of the agreement of the brothers which might be treated as one in the nature of a family compromise. Such a compromise being governed by special equities ought to be maintained as far as possible. The plaintiff is admittedly no party to it, but he may point to it as showing that at best the alleged custom has come to an end as far as his adult uncles are concerned, and that it clearly illustrates the weakness of defendants' evidence and the futility of his contention.

For the foregoing reasons I am of opinion that the defendant, Amir Khan, has failed to prove a special family custom by which he is entitled to succeed to the entire estate left by Muhammad

⁽¹⁾ *I. L. R., I Calc.*, 186.

Khan, and that plaintiff therefore should succeed in his suit. I would accordingly accept the appeal and decree his claim with costs throughout.

Appeal allowed.

No. 86.

Before Mr. Justice Chatterji and Mr. Justice Robertson.

IMAM DIN,—(PLAINTIFF),—APPELLANT,

Versus

GHULAM MUHAMMAD AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Civil Appeal No. 526 of 1897.

Custom—Pre-emption—Kucha Chabuk Sawaran, mohalla Qazi Sadar-uddin, gozar Rara in the city of Lahore.

Found, that the custom of pre-emption does not exist in respect of sale of houses in *kucha Rang Mahal*, which is a part of *kucha Chabuk Sawaran*, otherwise known as *kucha Kakkazaian, mohalla Qazi Sadr-uddin, gozar Rara* in the city of Lahore.

Held, that the law of pre-emption requires a certain stringency in deciding the question of the existence of such a custom in a city or sub-division thereof, and does not permit a finding in its favour simply on the ground that it exists in the neighbouring sub-divisions if there is no instance in the quarter in which the disputed property is situate.

Raman Mal v. Bhogat Ram ⁽¹⁾; *Thakar Das v. Muhammad Bakhsh* ⁽²⁾; *Saudagar Mal v. Aman Singh* ⁽³⁾; *Natha Singh v. Billa Singh* ⁽⁴⁾, followed.

Further appeal from the decree of W. O. Clark, Esquire, Divisional Judge, Lahore Division, dated 2nd February 1897.

Ishwar Das, for appellant.

Parker and Clark, for respondents.

The judgment of the Court was delivered by

15th May 1901.

CHATTERJI, J.—This is a suit for pre-emption of a house or stable lying to the east of the building called Rang Mahal, which is now the Mission School in the city of Lahore. It belonged to the Municipality and was sold by auction in 1885, and purchased by Pandit Rikhikesh. On 25th August 1893, Pandit Bansi Lal, son of Pandit Rikhikesh, sold it to Ghulam Muhammad, defendant No. 1, for Rs. 2,000.

On 8th August 1894, the present suit was lodged by the plaintiff, Imam Din. The allegations in the plaint which require to be noticed here are—

⁽¹⁾ 17 P. R., 1895.

⁽²⁾ 100 P. R., 1892.

⁽³⁾ 70 P. R., 1899.

⁽⁴⁾ 53 P. R., 1900.

- (1) That the house was erroneously described in the deed of sale as situate in *guzar* Rang Mahal, whereas it was really situate in *guzar* Chhajja Diwani, *mohalla* Sayad Nizam-ud-din, Bokhari.
- (2) That plaintiff's house and that claimed open in one and the same direction.
- (3) That the price was fixed in bad faith and only Rs. 804, and not Rs. 2,000 stated in the deed, were paid.

The vendee denied (1) that the house was situate in *guzar* Chhajja Diwani, (2) that there was any custom of pre-emption in this or in other *mohallas* of *guzar* Rara, and asserted that (3) the price was fixed in good faith and Rs. 2,000 were actually paid, and the real *mohalla* of the house was Qazi Sadar-ud-din. The pleas of the vendor were substantially the same.

In replication plaintiff insisted that the *mohalla* of the house was correctly stated by him and that pre-emption also prevailed in *mohalla* Qazi Sadar-ud-din.

The real points in issue were -

- (1) In what sub-division of the city of Lahore was the house in suit situate?
- (2) Whether the custom of pre-emption prevailed in such sub-division?
- (3) Was the price fixed in good faith?
- (4) If not, what was the market value of the house?

At the trial, the plaintiff attempted to show that the house was situate in the *guzar* and *mohalla* named by him in the pleadings. The defendant-vendee tried to establish his own allegations and further to prove that the street or *kucha* on which it opens is *kucha* Chabuk Sowaran.

The first Court found that the price was fixed in good faith and paid in full, that the plaintiff's statements as to the *guzar* and *mohalla* of the house were not made out, that the house was situate in *kucha* Chabuk Sawaran, *guzar* Rara, and that the custom of pre-emption was not shown to prevail therein. It accordingly dismissed the suit.

The Divisional Judge also held that the plaintiff's allegations as to the *guzar* and *mohalla* of the house were not proved, and that defendants' statement that the house is situated in *guzar* Rara, *mohalla* Qazi Sadar-ud-din, *kucha* Chabuk Sawaran, was correct, and that no custom of pre-emption was shown to exist in the latter *mohalla* and street. He dismissed the appeal.

The evidence as to the true name of the quarter of the city in which the house is situated is conflicting and the contradictions arise partly from bias or want of knowledge of the witnesses, and partly from the boundaries of the *mohallas* and *guzars* of Lahore being vague and indefinite. The plaintiff, however, has to show that the concurrent finding of the two Courts below is erroneous.

We observe that in 1886, after a prolonged inquiry, *kucha* Chabuk Sawaran was found by Mr. (now Sir Charles) Roe, then Divisional Judge of Lahore, to be included in *mohalla* Qazi Sadar-ud-din. We see no reason to dissent from this view as well as from the other conclusions of Mr. Roe, as to the portions of the city included in that *mohalla*, and no decision to the contrary has been cited by the plaintiff. We also observe from the enlarged map filed by plaintiff that *kucha* Chabuk Sawaran is shown therein as commencing nearly in front of the *Rang Mahal* running to a considerable distance to the north, east and south and rounding back to the east of plaintiff's own house on the strength of which he sues for pre-emption. The *kucha* on which the house in dispute is situate is a blind alley and terminates at plaintiff's house. It is probable that *kucha* Chabuk Sawaran, which is clearly a long street, begins at the western corner of *Rang Mahal* and not from the middle of the blind alley, but whether this be so or not, this alley called *kucha* Rang Mahal is apparently part of the former *kucha*. It has been found that plaintiff's house and that of his witness Abdul Rahim, which lie at the back of the disputed house, open on *kucha* Chabuk Sawaran. This is borne out by the deeds referred to by the Divisional Judge, which were executed long before the present controversy arose, one of them being an instrument of mortgage by the grandfather of the plaintiff himself. Plaintiff's house is situated therefore in *kucha* Chabuk Sawaran, otherwise called *kucha* Kakkazian, and it cannot be held to be in another *mohalla* merely because one of its doors opens on the blind alley next to the house in dispute. If *Kucha* Rang Mahal is a different *mohalla*, plaintiff having a house in *Kucha* Chabuk Sawaran could not claim pre-emption, but the probability is that the former is included in the latter. It is also not at all likely from its position in the map that the *Rang Mahal* and the houses opening on the blind alley belong to another *mohalla*, Sayad Nizam-ud-din, Bokhari, or Chhajja Diwani, from which it is entirely cut off by dead walls, while *kucha* Chabuk Sawaran opens into the alley. The plaintiff's contention appears to us to be wholly untenable. At all events we see no adequate reason to disturb the concurrent finding of the two lower Courts on the question of the locality of the house.

The next point for determination is whether the custom of pre-emption has been shown to exist in the sub-division in which the house is situate. The *onus* of proving this lies entirely on the plaintiff. His counsel refers to instances in other and neighbouring *mohallas* and contends that, even if this house be held to be situate in *mohalla* Qazi Sadar-ud-din, these instances suffice to establish the custom. He finds fault with the *dictum* in *Raman Mal v. Bhagat Ram* ⁽¹⁾ and *Thakar Das v. Muhammad Bakhsh* ⁽²⁾, to the effect that instances in other *mohallas* may be relevant evidence, but are not by themselves sufficient to prove the custom. He relies, *inter alia*, upon certain observations of Sir Meredyth Plowden in *Nanni Mal v. Sheo Nath* ⁽³⁾ No. 64, *Punjab Record*, 1887, page 133.

The view taken in *Raman Mal v. Bhagat Ram* ⁽¹⁾ has been approved in later cases, e.g., *Saudagar Mal v. Aman Singh* ⁽⁴⁾ and *Natha Singh v. Billa Singh* ⁽⁵⁾, and counsel complains that the first-named judgment has set the current against the reception in evidence of instances in other *mohallas* to prove the custom. It does not appear necessary, in view of our finding on the nature and bearing of the instances cited in this case, to discuss this point at length. We simply leave it on record that we see no cogent ground to differ from the view taken in *Raman Mal v. Bhagat Ram* ⁽¹⁾. The question whether the custom exists in a particular *mohalla* or not is no doubt a question of fact and not of law, and any opinion of Sir Meredyth Plowden is entitled to the highest weight. We think, however, that the pre-emption law appears to require a certain stringency in coming to a finding as to the existence of the custom in a city or sub-division thereof, which hardly allows the inference in favour of it to be drawn if there is no instance in the quarter in which the disputed property is situate. If the locality is fixed with certainty, which is not always an easy matter, and no instance of pre-emption is found therein, and nevertheless the custom is held to exist simply because it is found in other quarters, is not its existence *presumed*? But Section 11 appears to forbid any such pre-emption being drawn and to require the custom with all its incidents to be *shown to exist*, which may be interpreted to mean affirmatively proved. The section does not lay down anything about the mode of proof which is regulated by the Evidence Act, but construing it so as to give full effect to its provisions, it appears to us to exclude a presumption in favour of the custom under the above circumstances and also to forbid such

⁽¹⁾ 17 P. R., 1895.⁽³⁾ 64 P. R., 1887.⁽²⁾ 100 P. R., 1892.⁽⁴⁾ 70 P. R., 1899.⁽⁵⁾ 58 P. R., 1900.

a presumption being held sufficient by itself to support a finding in favour of the existence of the custom where no evidence is forthcoming of the exercise of the right of pre-emption within the *mohalla* of the disputed property. On the other hand there is no doubt that the inference drawn from instances in the *mohalla* may be materially strengthened by others in the neighbouring sub-divisions.

The mere admissibility of a piece of evidence is not invariably conclusive of its being sufficient by itself to support the conclusion it suggests. By way of analogy we may adduce one illustration. Under Section 30 of the Evidence Act the confession of a co-accused at the same trial may be taken into consideration, but it is not sufficient without other evidence to support the conviction of the accused.

In any case it cannot be denied that the section is intended to require stringency of proof as regards the right of pre-emption in towns, and the practical effect of this construction is indistinguishable from that laid down in the decisions impugned.

In the present case there is no need to act on the principle discussed above. The fixing of the locality of the house makes it incumbent on the Court first of all to consider the instances within that locality. There are two cases of pre-emption in *mohalla* Qazi Sadar-ud-din, one of 1874, the facts of which are different and very special, and another of 1888, which was settled by arbitration as to the price, no question of custom being decided or apparently raised. They are noticed by Colonel Marshall in his judgment, dated 16th May 1892, in the case of Muhammad Bakhsh v. Mohan Lal in which the custom was found not to exist in *mohalla* Qazi Sadar-ud-din. In the case of 1886, Kattu Mal v. Har Dyal, the question of custom was fully inquired into and decided in the negative by Mr. Roe. In the third case, which related to another *kucha* of Qazi Sadar-ud-din, the finding was against the existence of the custom. Thus there are three well-contested and well-considered decisions by the Courts of the Commissioner and Divisional Judge, in one of which the finding was upheld by the Chief Court, against the existence of the custom of pre-emption in the sub-division. Against these there are two judgments of Courts of first instance whose special features have already been noticed. There can be no hesitation in coming to a conclusion adverse to the plaintiff on these facts, and this is what the lower Courts have done. The instances in other *mohallas* cannot displace the above inference. At best it can only be said that the decisions as to custom are conflicting and that the indications of the existence of the custom are not clear, in which case also

the plaintiff's claim must fail. We have no difficulty therefore in accepting the finding of the lower Courts on this point also.

It is unnecessary to discuss the question of price.

The appeal is dismissed with costs.

Appeal dismissed.

No. 87.

Before Mr. Justice Chatterji.

SUNDAR MAL AND OTHERS,—(PLAINTIFFS),—
APPELLANTS.

Versus

SAWAN SINGH AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 1129 of 1899.

Pre-emption—Sale of occupancy right to a tenant with rights of occupancy in the village—Suit for pre-emption by landlords of the holding who did not proceed under the provisions of Section 53 of the Tenancy Act, 1887—Superior right—Punjab Laws Act, 1872, Section 12.

An old tenant who had under the *Wajib-ul-arz* full power of alienation sold his occupancy holding to another tenant with rights of occupancy in the village, the landlords of the holding filed a suit for pre-emption. The vendees contended that they being the tenants with rights of occupancy in the village have, under the last clause of Section 12, priority over them, as the pre-emptors who were the landlords of the holding had not proceeded under Section 53 of the Tenancy Act.

Held, that as the operation of Section 53 of the Tenancy Act was excluded by Section 111, the entry in the *Wajib-ul-arz* being tantamount to an agreement under Section 112, the last clause of Section 12 of the Punjab Laws Act could not apply, and the parties are relegated to their position under the first clause of that Section by which the landlords have a superior right of pre-emption.

Further appeal from the decree of H. A. Rose, Esquire, Additional Divisional Judge, Ferozepore Division, dated 28th July 1899.

Lal Chand, for appellants.

Ishwar Das, for respondents.

The judgment of the learned Judge was as follows:

CHATTERJI, J.—My previous judgment of 9th August 1900 18th May 1901. shows the object of the remand to the Divisional Judge.

The learned Judge now finds that the land is situate in three *pattis*, or rather *thulas*, in two of which plaintiff holds land while the vendee has none in any. Counsel for the respondent objects to this, and says that the so-called *thulas* are not real subdivisions

of the village, but after seeing the Settlement record I cannot agree with him, and over-rule the contention.

Another point urged is that the village is *pattidari*, i.e., held on ancestral shares, and that as a collateral relation, defendants are entitled to preference. The point appears to have been raised in a vague form in the lower Courts, but the first Court says that the exact relationship was not stated, and it appears that no sufficient evidence has been produced to establish it. It is too late now to ask for an inquiry on, or for an opportunity to prove, the allegation.

The last point on which stress is laid by the respondent is that he is an occupancy tenant in the village, and as such has, under the last clause of Section 12 of the Punjab Laws Act, priority over all proprietors except the landlords of the holding in case they proceed under Section 53 of the Tenancy Act. The plaintiffs are such landlords, but they have not proceeded under Section 53.

The clause in question does not absolutely exclude claims by persons falling under the first five clauses of Section 12, though it gives priority to those who come under the sixth and seventh clauses. *Hazari v. Isa and others* ⁽¹⁾ In this case, however, Section 53 of the Tenancy Act appears to have no operation. The seller is an old tenant, and under the *Wajib-ul-arz* has full power of alienation. There is no dispute between the parties as to the tenant being of this class. This being so, the operation of Section 53 appears to be excluded by Section 111, the entry in the *Wajib-ul-arz* being tantamount to an agreement under Section 112. The last clause of Section 12 of the Punjab Laws Act only applies where Section 53 of the Tenancy Act applies, the first part being intended to save the rights of the landlord under the latter section. The rights of the two other classes only arise where the landlord refuses or neglects to exercise that right; and on no other contingency. As the landlord here cannot exercise the right, it appears to follow on the foregoing reasoning that the rights of the others under the last clause of Section 12 of the Laws Act do not come into existence, or, in other words, the whole clause is inoperative. The parties then are relegated to their position under the first part of Section 12, and possess rights of pre-emption in the order provided therein. The defendants, vendees, thus as proprietors in other *thulas* or tenants with right of occupancy are postponed to the plaintiff.

No other point was argued at the hearing or appears to call for notice. The question of price was not pressed, and though the

(1) 106 P. R., 1882.

first Court omitted to frame an issue as to good faith, I observe that so large a sum as Rs. 197 is said to have been paid at home as earnest money, which is unusual. The *onus* of proof of payment of the full sum would lie on the vendees, and the valuation made by the first Court was rightly held to be correct by the Divisional Judge. I do not think therefore that the case should be further prolonged for an inquiry as to good faith at this stage.

I accept the appeal and restore the decree of the first Court, but the parties will pay their own costs in this and in the Divisional Court.

Appeal allowed.

No. 88.

Before Mr. Justice Reid.

MIR ZAMAN KHAN AND OTHERS,—(PLAINTIFFS),—
APPELLANTS.

Versus

MUSSAMMAT GHULAM FATIMA,—(DEFENDANT),—
RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 1141 of 1900.

Pre-emption—"Sale"—Assignment of immovable property by husband to wife in lieu of her dower.

A husband transferred his immovable property to his wife in lieu of her dower, the value of the property purporting to be transferred being considerably in excess of the amount of dower due. *Held*, that such transfer was not a sale, but to a great extent a gift, and was therefore not subject to pre-emption.

Fida Ali v. Muzaffar Ali ⁽¹⁾, distinguished.

Further appeal from the decree of Major E. Inglis, Divisional Judge, Peshawar Division, dated 25th July 1900.

Lal Chand, for appellants.

Ram Bhaj Datta, for respondent.

The judgment of the learned Judge was as follows:—

REID, J.—The first question for decision is whether pre-emption exists in respect of a transfer of immovable property by a husband to his wife in lieu of her dower under the circumstances stated in the judgments of the Courts below. 25th May 1901.

The question has been dealt with in Civil Appeal No. 34 of 1897, in which judgment was delivered on the 14th November 1900, and I see no reason to dissent from the decision therein arrived at.

The bearing of the judgment of Mahmud, J., in *Fida Ali v. Muzaffar Ali* ⁽²⁾, on facts which are practically on all-fours with

⁽¹⁾ *I. L. R., V All., 65.* ⁽²⁾ *I. L. R., V. All., 65.*

the facts in this case, was considered in that judgment. The plaintiffs-appellants in the present case alleged that the land in suit was worth far more than the dower debt, which they alleged to be Rs. 200, and a gold *mohar*, and the reasons recorded in Civil Appeal No. 34 of 1897 for holding that the transfer was not subject to pre-emption apply to this feature also of the present case, the appellants having expressed their willingness to pay Rs. 600 for the land in suit. The pleader for the appellants relies on the Allahabad case, above cited, *Mul Chand and another v. Mansa Ram and others* ⁽¹⁾, *Haji Muhammad v. Mussammat Bakhto and another* ⁽²⁾, and *Sayad Ahmad Shafi v. Mussammat Bunyadi Begum* ⁽³⁾, but nothing contained in these judgments appears to me to be a ground for dissenting from No. 34 of 1897. Dower is doubtless a debt due from the husband to the wife, but the definition of sale in the Transfer of Property Act, which has been accepted as applicable to suits for pre-emption in this Province other than those under Muhammadan Law, differs widely from the definition under Muhammadan Law, and although transfers for a debt due have been held to be subject to pre-emption in this Province, no element of gift was present in those cases. A transfer by a husband to his wife in lieu of dower differs widely from a transfer by a creditor to a debtor who has not a claim on the transferor independent of the debt due.

For these reasons I dismiss the appeal with costs.

Appeal dismissed.

NOTE.—The case No. 34 of 1897 cited in the above judgment is noted below:—

Before Mr. Justice Reid and Mr. Justice Harris.

SIRAJ DIN, — (PLAINTIFF), — APPELLANT.

Versus

ILAM DIN, — (DEFENDANT), — RESPONDENT.

Civil Appeal No. 34 of 1897.

Lakhshmi Narain, for respondent.

APPELLATE SIDE. {

14th November 1901.

REID, J.—The facts of this case are stated in the judgments of the Courts below, and need not be repeated.

On the evidence we are satisfied that the value of the property in suit is considerably in excess of the consideration expressed in the deed alleged by the plaintiff-appellant to be a deed of sale.

The appellant's argument that an incumbrance on the property of Rs. 150 must be discharged by the purchaser, and that the consideration is therefore in excess of the sum expressed is, in our opinion, against his

⁽¹⁾ 157 P. R., 1883. ⁽²⁾ 54 P. R., 1889.

⁽³⁾ 88 P. R., 1891.

contention that the transaction is a sale. Had there been a sale we should have expected to find a condition for the discharge of incumbrances in the deed of sale.

The words "*tai wa ferokht*" were probably inserted by the writer of the deed as a matter of form, and do not express the intention of the executant.

The facts in *Fida Ali v. Muzaffar Ali* ⁽¹⁾ are distinguishable from those before us.

In that case the transfer was for Rs. 2,000 out of Rs. 2,500 due as dower, while in the case before us the value of the property purporting to be transferred considerably exceeds the dower.

Moreover the definition of sale under Muhammadan Law, on which Mahmud J., based his decision, differs widely from the definition of sale in the Transfer of Property Act, and although that Act does not apply to this province, the definition may be accepted in suits under the Punjab Laws Act. The appellant claims under that Act, and does not claim under Muhammadan Law.

The passage from *Fida Ali v. Muzaffar Ali* ⁽¹⁾ quoted by the learned Divisional Judge is in point, and we concur in his view of the nature of the transaction, *i.e.*, that it was to a great extent a gift.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 89.

Before Mr. Justice Chatterji and Mr. Justice Maude.

PREM SINGH,—(DEFENDANT),—APPELLANT,

Versus

LABH SINGH AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 824 of 1898.

Religious institution—Management of—Funds of the temple—Worshippers not entitled to call for accounts from the mahant unless there is proof of a custom or practice entitling them to do so—Civil Procedure Code, 1882, Section 539—Sanction—Court cannot grant relief outside the sanction.

Where the plaintiffs had applied for permission under Section 539 of the Code of Civil Procedure to sue to have a committee appointed by a Civil Court for the management of a certain religious trust, and to obtain such other relief as they might be entitled to under the said section and the Collector had merely "accorded permission."

Held, that the suit must be limited to matters covered by the sanction, and that the plaintiffs were not competent to sue for the removal of the defendant from the office of *mahant*, the Court having no authority to enlarge the scope of the suit and to grant any other reliefs other than those included in the terms of the sanction.

⁽¹⁾ *I. L. R., V All., 65.*

Held, also, that the *mahant* of a religious institution is presumed to be the manager of the institution over which he presides and is not bound to submit accounts for the information or approval of the worshippers at the shrine unless it is proved by evidence that it is the custom and practice of the institution for him to do so. Civil Courts are not justified in forcing a scheme of management on a religious or charitable institution unless there is clear proof that there has been such mismanagement or misconduct as calls for judicial interference.

Further appeal from the decree of Kazi Muhammad Aslam, C.M.G., Additional Divisional Judge, Sialkot Division, dated 18th April 1898.

K. P. Roy and Lal Chand, for appellant.

Madan Gopal and Ishwar Das, for respondents.

The facts of this case sufficiently appear from the following judgment of

27th May 1901.

MAUDF, J.—This is an appeal from a judgment of the Additional Divisional Judge, Sialkot, which has directed the removal of the defendant Prem Singh from the office of *mahant* of the well-known Sikh shrine of Ber Baba Nanak at Sialkot, and has confirmed the order of the District Judge appointing a committee of management to superintend the affairs of the institution.

The first objection taken on further appeal to this Court was that the lower Appellate Court illegally assumed a jurisdiction, empowering it to remove the *mahant* and to appoint a committee of management inasmuch as no valid sanction was given to the plaintiffs to institute the suit, with reference to the provisions of Section 539 of the Code of Civil Procedure. That section (*inter alia*) provides that in case of any alleged breach of any express or constructive trusts created for public charitable or religious purposes, two or more persons having an interest in the trust, and having obtained the consent in writing of certain authorities, may institute a suit to obtain a decree to effect certain objects mentioned in the section. In this Province the Local Government has authorized Collectors to give consent under this section. Accordingly on April 2nd, 1896, the plaintiffs, six in number, presented a petition to the Collector, which after setting out certain facts and allegations prayed with reference to Section 539 of the Code that permission might be granted to them to enable them to have a committee of management appointed by a Civil Court, and to obtain such other relief as they might be entitled to obtain under the said section. The Collector apparently did not call on the petitioners to show that any express or constructive trust existed, but passed an order on their application observing that he had

informed the *mahant* that he did not see how it would be possible to withhold the necessary permission under Section 539; that the petitioners were Sikhs, residents of the District, and as such interested in the administration of the trust; and that the *mahant* as custodian of the shrine was in the Collector's opinion answerable to the sect resident in the district where the shrine is situated for the administration of the trust. Then comes the operative portion of the order, "I therefore consider that permission must be accorded," but there is no further indication as to the nature or extent of the permission. Thus the plaintiffs did not specifically ask the Collector to give his consent to the removal of the defendant from the office of *mahant* or trustee of the institution, nor did the Collector give such consent. It was argued on behalf of the appellant that the Collector's order is not a proper one within the scope of Section 539 of the Civil Procedure Code and therefore invalid, and that in consequence the suit could not be entertained. I do not think that this objection can be accepted: clearly the Collector intended to sanction the institution of a suit, and did sanction its being brought. At the same time I am of opinion that the extent and nature of the sanction given must be considered, and this can only be gathered from reading the Collector's order with the petition presented by the plaintiffs. Nowhere in that petition is it hinted, much less expressed, that their object was the removal of the appellant from the office of *mahant*, and I am not prepared to say that had that been the expressed object, the Collector would have sanctioned the institution of a suit to attain it, assuming that such a suit is contemplated by the section. *Sayad Hussein Miyan, Dada Miyan and another v. The Collector of Kaira* (1) is authority for holding that when sanction is given to the institution of a suit under the section in question, the suit must be limited to matters included in the sanction, and that it is not competent to the Court to enlarge the scope of the suit and to grant reliefs other than those included in the terms of the sanction. Holding this view I am of opinion that, under the written consent of the Collector, the respondents were not competent to sue for the removal of the appellants from the office of *mahant*. It is, therefore, unnecessary to discuss the question (on which there is a considerable divergence of opinion in the rulings of the High Courts) whether a suit will lie under Section 539 of the Code of Civil Procedure to remove a trustee of a charitable trust: nor is it necessary to determine whether this suit could lie apart from the provisions of that section, for it has not been contended on

(1) *I. L. R.*, XXI Bom., 257.

behalf of the respondents that the suit does not fall within its scope.

Turning now to the merits of the case, I observe that the plaint is silent as to any specific instances of misconduct or malfeasance on the part of the appellant. It is vaguely stated that he misappropriates the income of the shrine, that he refuses to show any accounts, and that he is unreliable and hateful to the Sikhs and worshippers of the temple.

As regards the last allegation, it may be noted that in the Gazetteer of the Sialkot District it is remarked that the shrine in question "is one of the most important shrines in the Province"; it also appears from the same authority that according to the census of 1891 there are in round numbers, 50,000 Sikhs in the district. As, then, the plaintiffs are only six in number, while such is the importance of the shrine, and so large the number of Sikhs in the district, there appears to be no warrant for the allegation in the plaint that the *mahant* has become hateful to the Sikhs; it is equally reasonable to suppose that some private grudge may have actuated the six plaintiffs to bring this suit.

With reference to the right of the plaintiffs to require the *mahant* to produce accounts, both the Lower Courts appear to me to have assumed too readily that such a right must exist. The District Judge has observed in his judgment, "the funds of the temple forming a trust, the *mahant* being trustee, he must be responsible to some one The responsibility being once admitted, it follows that those having an interest have a right to call for an account of the administration of the trust funds." And, similarly, the learned Divisional Judge has remarked, "if it is once held that the defendant is a trustee he is responsible to the worshippers and contributors for the trust fund and the plaintiffs are justified in seeing that the money is spent for purposes for which it is intended."

From using the somewhat technical English words "trust" and "trustee," it would seem that the Lower Courts have unconsciously imported into the case a consideration based possibly on some idea of western legal principles not necessarily applicable to the subject of the present suit. It does not follow that because a *mahant* is not the proprietor, but the manager, of a religious institution, therefore he is necessarily bound to submit accounts to those interested in the institution. On the contrary, as is pointed out in para. 93 of Sir William Rattigan's Digest of Punjab Customary Law (3th edition), so long as he retains

office, he is presumed to have the sole management of the endowment or institution over which he presides; and their Lordships of the Privy Council have laid down that the only law as to *mahants* and their offices, functions and duties is to be found in custom and practice which is to be proved by testimony. (*Govardhin Das v. Nundo Mohan Das Mahant* ⁽¹⁾). In the present case I can find no proof that it has been the custom or practice for the *mahant* to submit for the information or approval of the worshippers at the shrine accounts showing how the income of the institution has been expended.

The respondents' pleader relied on certain documents alleged to have been drawn up in 1853, 1859 and 1863, respectively, by which it is said arrangements were made for the management of the institution, and which show that the *mahant* was entrusted only with limited authority, but I consider it unnecessary to examine the contents of these documents, for it has not been shown that they were ever acted on, and the appellant did not succeed to the office of *mahant* until many years subsequent to the preparation of the latest of them. I am unable then to hold that the mere failure to render accounts is evidence of malversation, or constitutes a reason for interference.

The real question is whether there has been such misconduct or incompetence on the part of the appellant as would justify a Civil Court in settling a scheme for the management of the institution. The question is discussed at some length in the judgment of the District Judge whose conclusion is that the accounts were not regularly kept as would be the case in a large business firm, but that one thing seemed clear that the *mahant* personally could not, in the absence of definite rules to guide him, be said to be guilty of misappropriation. The Divisional Judge was unable to accept this conclusion, and, after citing certain instances, held that the appellant had misappropriated *darbar* money to his own uses or those of his relatives. The instances, however, were not examined in detail. There is a large quantity of evidence on the record given orally, but it is of a vague character, that for the plaintiffs alleging various forms of extravagance to which the *mahant* was addicted, and it is difficult to seize on any concrete instances in which the *darbar* funds can be said to have been wrongfully misappropriated. It must be remembered that the relatives of the appellant, such as Sohan Singh and Hazura Singh, who are alleged to have been granted allowances improperly, are themselves the

⁽¹⁾ 11 Moo. I. A., 428.

descendants of past *mahants* who had enjoyed a share in the *jagirs*, and there is nothing repugnant to ordinary ideas in such matters in this country, in the descendants being allowed some allowances.

The *mahant* did keep accounts for they were examined by the District Treasurer's agent who was appointed a commissioner to examine them. His report is on the record, and he was also examined as a witness. Apparently, out of Rs. 71,322 gross receipts, only a small sum of Rs. 678 was unaccounted for. It is not a difficult task for counsel to formulate definite charges of special acts of malversation, but so far as I can gather from the evidence on the record it cannot be held proved that the appellant *mala fide* made an improper use of any of the funds which came into his hands as manager of the shrine. There is no proof of any recognized custom strictly limiting his powers of spending the income; his duty no doubt was to maintain the shrine and dispense its charities, but what disinterested evidence there is is in favour of the view that the affairs of the institution have been administered by the appellant with efficiency and to the general satisfaction. I do not think then that a sufficient case has been made out for interference. It is not the policy of Government to interfere without good reasons in questions pertaining to the management of religious or charitable institutions, and in my opinion a Civil Court is not justified in forcing a scheme of management on an institution unless there is clear proof that there has been such mismanagement or misconduct as calls for judicial interference. In the present instance I do not think that there is such proof. I would therefore accept the appeal, and dismiss the plaintiffs' suit with costs.

30th May 1901.

CHATTERJI, J.—I concur generally in the foregoing judgment and in accepting the appeal and dismissing the plaintiffs' suit.

Appeal allowed.

No. 90.

Before Mr. Justice Chatterji.

BHAGWANA AND OTHERS,—(DEFENDANTS),—
APPELLANTS,

Versus

HANWANTA,—(PLAINTIFF),—RESPONDENT.

Civil Appeal No. 956 of 1898.

Custom—Pre-emption—Pre-emption on sale of shop—Hissar City.

Found, that the custom of pre-emption in respect of sale of shops exists in the town of Hissar.

APPELLATE SIDE. }

Further appeal from the decree of A. E. Hurry, Esquire, Divisional Judge, Ferozepore Division, dated 19th April 1898.

Durga Das, for appellants.

Ganpat Rai, for respondent.

The judgment of the learned Judge was as follows :—

CHATTERJI, J.—No objections have been filed to the return of the Divisional Judge which is in respondent's favour. The District Judge gave no opinion as he ought to have done. But the Local Commissioner has given his, and I do not think it necessary to return the case to supply the omission of the District Judge. 27th May 1901.

Though the appellant has filed no objections, I have heard his pleader. His argument is that the case stands where it was at the time of remand, that the locality of the shop does not form a special sub-division, and that the custom must be proved for the whole town as regards shops.

I concur with the Divisional Judge and the Local Commissioner that the *mohalla* of the shop in suit set up by the defendant-vendee, is too small to be treated as a sub-division of Hissar, and that either the custom of the whole town is to be acted on as appellant's counsel himself contends, or the larger *mohalla* extending up to the butcher's mosque and the hospital should be treated as a sub-division for purposes of pre-emption.

There is sufficient proof that pre-emption prevails in the town of Hissar, if the custom of the whole town is taken into consideration. There are two instances cited of house property and open land. In one case in *mohalla* Sanao, the custom was not found to exist, but the effect of it should be confined to that *mohalla*.

As regards shops there are two cases, one of 13th December 1892 and another of 29th March 1893. In the former, the custom was found and in the latter the custom was admitted, and the question simply was whether the vendee or the claimant had the superior right. The Divisional Judge refers to a third case of 1895 in which the custom was found to exist as to shops and which he thinks appertains to the same sub-division as that of the present shop. I have not got the record, but as there is no allegation that his finding is wrong, I can accept it. Then as regards shop Z the right was admitted in the deed of sale, and it is shown that with reference to the disputed shop there was a notice issued in 1892 by the owner, Ahmad, under the Punjab Laws Act, to the pre-emptor, Hira. Hira did not purchase, but the present vendor did.

Taking the whole city as one as defendants' counsel contends, the custom is sufficiently proved by the above instances. If we take the *mohalla* of the shop to be a distinct sub-division the case of 1895 is an instance in point, while the notice of Ahmad and the sale-deed of shop Z though not of much value in themselves may under the circumstances be treated as fair indications that the custom exists as respects shops as well as houses in this sub-division also. Both the lower Courts originally found, and again the Divisional Judge and the Local Commissioner on remand find in favour of the existence of the custom, and I am not prepared on the whole to differ from them.

The appeal is dismissed with costs.

Appeal dismissed.

No. 91.

Before Mr. Justice Reid.

APPELLATE SIDE. { GUJAR MAL AND OTHERS,—(DEFENDANTS),—APPELLANTS,
Versus
RAM RICHPAL AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

Civil Appeal No. 24 of 1901.

Common land—Joint vacant piece of land in mohalla—Right of suit of some of the inhabitants of the mohalla affecting such land—Plaint—Alternative reliefs—Injunction when to be granted—Discretion of Court—Damages.

The plaintiffs sued to recover possession of a piece of land situate in front of their houses and shops alleging that it had been jointly enjoyed by them, and that the defendants Nos. 1 and 2 having obtained a fictitious deed of sale of a portion thereof from defendant No. 5 had taken possession and commenced to build thereon, the relief sought being either a decree for possession of the land or an injunction restraining the defendants Nos. 1 and 2 from building thereon. The lower Appellate Court gave the plaintiffs, "as members of the community," a decree for possession, and also issued a permanent injunction to the defendants prohibiting the erection of any building on or other interference with the land in suit.

Held (i) that the claims were not inconsistent, the difference being between sole right and joint right and that the plaintiffs were at liberty to claim in the alternative exclusive possession or an injunction to restrain the defendants from interfering with their rights as co-sharers in the land in suit;

(ii) that the land in suit not being a public thoroughfare, the suit lay;

(iii) that the plaintiffs were entitled to sue in their own right for a relief common to themselves and others, and that the failure to sue on behalf of those others was not a bar to their suit;

(iv) that inasmuch as the exclusive occupation by the defendants would have materially injured the plaintiffs they were entitled to the injunction issued by the first Court.

Raja Bijoy Keshub Roy v. Obhoy Churn Ghose ⁽¹⁾, *Muhammad Sharif v. Shamsheer Khan* ⁽²⁾, *Mussammatt Parbati and others v. Kaur Singh* ⁽³⁾, *Nurul Hussein v. Sheosahai Lal* ⁽⁴⁾, *Ningappa v. Shivappa* ⁽⁵⁾, *Raghobar Dial and others v. Kesho Ramaunj Das* ⁽⁶⁾, *Amin Chand v. Dasaundha Singh and others* ⁽⁷⁾, *Hira Lal v. Bhairon* ⁽⁸⁾, *Baiju Lal Parbatia and others v. Bulak Lal Pathuk* ⁽⁹⁾, *Tanudin and others v. Pandu and others* ⁽¹⁰⁾, *Baldeo Bharthi v. Bir Gir and others* ⁽¹¹⁾, *Framji Cursetji v. Gokul Das Madhorji* ⁽¹²⁾, *The Shammugger Jute Factory Coy., Ltd., v. Ram Narain Chatterjee* ⁽¹³⁾, *Jou Chunder Rukhit v. Bipbo Churn Rukhit* ⁽¹⁴⁾, and *Ram v. Pir Bakhs* ⁽¹⁵⁾, referred to.

Further appeal from the decree of W. A. Harris, Esquire, Divisional Judge, Delhi Division, dated 12th October 1900.

K. P. Roy and Lal Chand, for appellants.

Madan Gopal and Shadi Lal, for respondents.

The judgment of the learned Judge was as follows:—

REID, J.—The Courts below have dealt at considerable length with the facts and the arguments addressed to them, and the appeal has been argued at still greater length in this Court, the arguments having extended over two days. 30th May 1901.

The relief sought by the respondents was either a decree for possession of the land in suit, or an injunction restraining the appellants from building thereon and thereby interfering with the easement of the respondents.

The word translated “easement” really includes joint right such as co-sharers have in common land.

The first plea to be dealt with is that the alternative relief sought is bad, and the plaint should have been rejected.

The authorities relied on, which have any material bearing on the point, are, for the appellants *Raja Bijoy Keshub Roy v. Obhoy Churn Ghose* ⁽¹⁾, for the respondents *Muhammad Sharif v. Shamsheer Khan* ⁽²⁾, *Mussammatt Parbati and others v. Kaur Singh and another* ⁽³⁾, *Nurul Hussein and others v. Sheosahai Lal* ⁽⁴⁾, *Ningappa and another v. Shivappa and others* ⁽⁵⁾, and an

⁽¹⁾ 16, W. R., 198.

⁽²⁾ 11, P. R., 1891.

⁽³⁾ 85, P. R., 1896.

⁽⁴⁾ I. L. R., XX Calc., 1, P. C.

⁽⁵⁾ I. L. R., XIX Bom., 323.

⁽⁶⁾ I. L. R., XI All., 18

⁽⁷⁾ 54, P. R., 1886.

⁽⁸⁾ I. L. R., V All., 602 F. B.

⁽⁹⁾ I. L. R., XXIV Calc., 385.

⁽¹⁰⁾ I. L. R., XVIII Bom., 699.

⁽¹¹⁾ I. L. R., XXII All., 269.

⁽¹²⁾ I. L. R., XVI Bom., 338.

⁽¹³⁾ I. L. R., XIV Calc., 189.

⁽¹⁴⁾ I. L. R., XIV Calc., 236

⁽¹⁵⁾ 33, P. R., 1901.

unpublished ruling, Civil Appeal 1437 of 1897 of this Court. The rule which I deduce from these authorities is that the respondents were at liberty to claim, in the alternative, exclusive possession or an injunction to restrain the appellants from interfering with their rights as co-sharers in the land in suit. The claims are not inconsistent, the difference being between sole right and joint right. The next plea to be dealt with is that the respondents could not sue, the right alleged to have been invaded being a public right of way, but this plea is based on a misconception of the claim and the decree. The respondents sued to establish rights vested only in them or in them and a limited number of persons residing in their *mohalla*. A suit therefore lay.

The next plea is that in any case all the co-sharers in the *mohalla* or in the land in suit should have been made parties to the suit or should have been formally represented by the respondents under Section 30 of the Code of Civil Procedure.

The authorities cited and in point are, for the appellants *Raghubar Dial and others v. Kesho Ramauji Das* ⁽¹⁾, for the respondents *Amin Chand and others v. Dasaundha Singh and others* ⁽²⁾, *Hira Lal v. Bhairon and others* ⁽³⁾, *Boiju Lal Parbatia and others v. Bulak Lal Pathuk* ⁽⁴⁾, and *Tanudin and others v. Pandu and others* ⁽⁵⁾.

On these authorities I hold that the respondents were entitled to sue in their own right for a relief common to themselves and others, and that the failure to sue on behalf of those others was not a bar to their suit or to the decree which they have obtained.

On this finding it is unnecessary to consider whether the failure to proceed under Section 30 of the Code could have been cured, as laid down in *Baldeo Bharthi v. Bir Gir and others* ⁽⁶⁾, and I have not held the respondents barred by Section 34 of the Code from taking the plea of non-joinder, because it was not taken at or before the first hearing, for the reason that the respondents' primary contention in the Court of first instance was that they were exclusive owners of the land in suit and the appellants were possibly misled into not taking the objection.

On the facts I find that the land in suit has never been authoritatively decided to be a public thoroughfare or public in the sense that persons other than the inhabitants of the *mohalla* have rights in it, and I further hold that the respondents are residents

⁽¹⁾ *I. L. R.*, XI All., 18.

⁽²⁾ 54, *P. R.*, 1886.

⁽³⁾ *I. L. R.*, V All., 39, F. B.

⁽⁴⁾ *I. L. R.*, XXIV Cal., 385.

⁽⁵⁾ *I. L. R.*, XVIII Bom., 699.

⁽⁶⁾ *I. L. R.*, XXII All., 269.

of the *mohalla* in which that land is situate. Their houses form one side of the square, and I see no reason to doubt that Chipatwara is part of Bala Serai. The oral and documentary evidence on the record proves that the respondents and their ancestors have exercised rights of ownership over the land in suit for a long period, for more than twenty years, and I concur with the Courts below in the opinion that the respondents and other residents of the *mohalla* acquired at some period those rights, which they enjoyed up to within a very short period, considerably less than five years of suit.

Chuhar, father of the appellants, vendor, certainly asserted exclusive rights to the land in suit, but failed to establish them, and was certainly not in exclusive possession.

The fact that the land is not *nazul* does not prevent its being the property of the residents of the *mohalla*, and the proceedings of the Municipal Committee do not help the appellants.

Their pleader has laid great stress on the fact that huts erected for distribution of drinking water at fairs have not usually mud walls, but I see no reason to differ from the finding by the Court of first instance that these walls were of a later date than May 1895, when the sale-deed in favour of the appellants was executed. I see no reason to doubt that the hut was erected for the purpose found by the Courts below. The vendor, as one of the community, could not use the land exclusively, to the detriment of other members of the community, and could not transfer such a right.

The pleader for the appellants has cited *Framji Cursetji v. Gokuldas Madhowji* ⁽¹⁾, *The Shamnagger Jute Factory Co., Ltd., and another v. Ram Narain Chatterjee and others* ⁽²⁾, *Joy Chunder Rukhit v. Bippro Churn Rukhit* ⁽³⁾, and *Ram v. Pir Bakhsh* ⁽⁴⁾, as authority for the contention that an injunction should not have been granted, the injury to the respondents being insignificant, and a *pakka chaupal*, proved to exist in the *mohalla*, rendering the use of the land in suit for public purposes unnecessary.

This contention cannot be allowed. The injury to the respondents, to prevent which the injunction has been granted, would be serious, and the injunction causes no injury to the appellants.

The fact that the hut was allowed to stand for so many years, although the special purpose for which it was erected extended only to a few days each year, is no reason for holding

⁽¹⁾ *I. L. R.*, XVI Bom., 338.

⁽²⁾ *I. L. R.*, XIV Cal., 189.

⁽³⁾ *I. L. R.*, XIV Cal., 236.

⁽⁴⁾ 33, P. R., 1901.

that the enclosure of the land and its exclusive occupation by the appellants would not materially injure the respondents.

The remaining pleas are that the decree is indefinite, and that the document P. W. 3 of 1843 was inadmissible as an ancient document, not having come from proper custody.

The decree is definitely in favour of the respondents, and the words "as members of the community" merely exclude the interpretation that rights to the exclusion of all other residents of the *mohalla* are decreed to the respondents.

The document was produced by the witness Lala Bas, grandnephew of the persons in whose favour it was executed, who satisfactorily proved his relation to those persons.

The land in suit differs from public land or a public thoroughfare in that a limited number of co-sharers could combine and do what they choose with it.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 92.

Before Mr. Justice Robertson and Mr. Justice Harris.

MUSSAMMAT KARAM BIBI AND OTHERS,—(PLAINTIFFS),
—APPELLANTS,

APPELLATE SIDE. {

Versus

HUSSAIN BAKHSH AND ANOTHER,—(DEFENDANTS),—
RESPONDENTS.

Civil Appeal No. 212 of 1898.

Custom—Inheritance—Koreshis of Gujranwala—Muhammadan Law.

In a suit the parties to which were Koreshis of the town of Gujranwala and not agriculturists and the property in dispute was situate in that town, found, in the absence of a special custom to the contrary that the rule of inheritance was governed by Muhammadan Law.

Ahmad Din v. Mussammat Fazlan (1) cited.

Further appeal from the decree of Sardar Gurdial Singh, Man, Divisional Judge, Sialkot Division, dated 19th January 1898.

Muhammad Shaffi, for appellants.

The judgment of the Court was delivered by

1st June 1901.

ROBERTSON, J.—By an order of this Court, dated 12th November 1900, this case was remanded under Section 566, Civil Procedure Code, for an enquiry on two points, (1) are the parties

governed by Muhammadan Law, or by custom; and (2) in either case are the widow Mussamat Karam Bibi and her unmarried daughters entitled to retain possession of the house in question until the death of the former and death or marriage of the latter.

The enquiry made has not been very full and exhaustive, and both the lower Courts have erroneously held that plaintiffs are estopped from pleading that Muhammadan Law applies. Nothing has occurred between the parties which in any way amounts to estoppel. The fact that defendant, mortgagor's father, once, to suit his own purposes, asserted that a certain custom prevailed, does not estop the present plaintiff from asserting a different view though no doubt it is relevant piece of evidence.

The parties are Koreshis of the town of Gujranwala, and the property in dispute is situate in that town. They are not agriculturists, certainly not agriculturists pure and simple, though there appears to be some land in another village in the inheritance. Under the clauses of Section 5 of the Punjab Laws Act if any custom is shown to govern the parties that custom must be applied, but if no custom is shown to apply, then the personal law of the parties governs the case, and the personal law of the parties is Muhammadan Law.

The weight of evidence taken on remand, so far as it goes, is on the side of the plaintiff. One of the near relatives, Qutb-din's brother and uncle of the defendant mortgager, no doubt gives evidence that the family is bound by custom, but his position in life at present detracts very much from the value which might under other circumstances have attached to his evidence.

There is no allusion to the Koreshis in the *Riwoj-i-am* of the district, and though it is urged that they are included in miscellaneous tribes this is not clearly established, and seems very doubtful.

It has been held by this Court in a judgment published as *Aimad Din v. Mussamat Fazlan* ⁽¹⁾ that the Koreshis of Wazirabad, a town only 20 miles from Gujranwala in the same tract and district and in every respect very similarly circumstanced, are governed by Muhammadan Law.

On a full consideration of the whole case we are of opinion that it has not been shown that the Koreshis of Gujranwala are bound by custom, nor what custom, if any, they are bound by; they are not agriculturists, certainly not purely agriculturists;

⁽¹⁾ 175, P. R., 1883.

they are a special class, they are townsmen, and the property in dispute is in a town, and in a neighbouring town Koreshis have been clearly held bound by Muhammadan Law, and the evidence on the record in this case supports the view that Muhammadan Law applies. We accordingly find that the parties are governed by that law, and give the plaintiff the decree sought, for the share to which the widow and three daughters are entitled under Muhammadan Law, which we find to be $\frac{2}{40}$ ths of the property in dispute. In one of the grounds of appeal 6 (b) it is alleged that the plaintiff's dower forms a charge on the property in question, but no mention of this claim was made by the learned counsel for the appellant, and we understand that it was abandoned.

Respondents will pay $\frac{2}{40}$ ths of the appellant's costs throughout.

Appeal allowed.

No. 93.

Before Mr. Justice Harris.

JHANDA SINGH AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,*Versus*

GURMUKH SINGH,—(DEFENDANT),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 898 of 1900.

Custom—Alienation—Gift to a nephew of immoveable property inherited from an uncle—Ancestral property.

In a case in which the self-acquired property of an uncle was inherited by his nephews on his dying childless, *held*, that the said property was not ancestral property *qua* the sons of those nephews as it was not inherited from a direct male ancestor, and that a gift of such property by the nephews to their sister's son was not invalid by custom.

Bulki and others v. Bira and others (¹) and *Jowahir Singh v. Dial Singh and others* (²) cited.

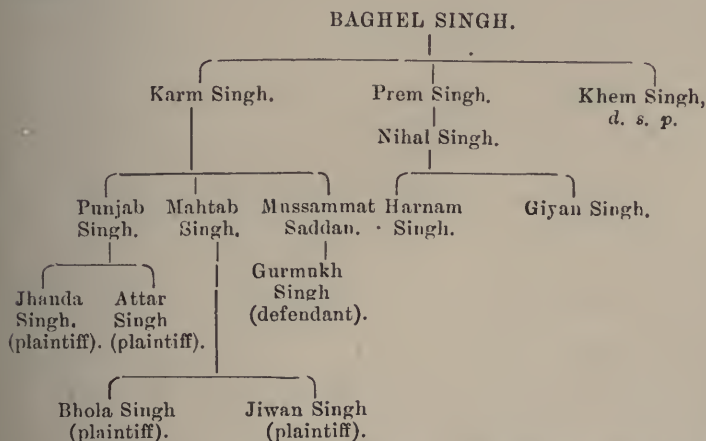
Further appeal from the decree of W. C. Rencuf, Esquire, Divisional Judge, Ferozepore Division, dated 23rd July 1900.

Krishen Singh, for appellants.

Sham Lal and Shambu Nath, for respondent.

The judgment of the learned Judge was as follows:—

HARRIS, J.—Parties who are Jats of *tahsil* Moga, are thus related:—



In 1888 Punjab Singh and Mahtab Singh gifted one-third of their share in Khem Singh's landed estate to Gurmukh Singh, and their sons now sue Gurmukh Singh for that one-third share.

(¹) 43, P. R., 1890.

(²) 76, P. R., 1898.

It was pleaded, *inter alia*, by defendant that the land was acquired by Khem Singh, while the plaintiffs alleged it descended from Baghel Singh.

The first Court, without coming to any definite finding whether the land was acquired by Khem Singh or inherited by him from Baghel Singh, held that even if acquired by Khem Singh the land must be considered ancestral property, and eventually decreed the claim.

On appeal the Divisional Judge found the land in suit to have been acquired by Khem Singh, and held that as the fathers of plaintiffs did not inherit the land from their father, and as the common ancestor Baghel Singh never held the land, the property was not ancestral, and dismissed the claim.

In further appeal it is urged for plaintiffs that the land is ancestral, and that even if self-acquired, alienation is restricted.

With regard to the latter proposition there is not a tittle of evidence in favour of plaintiffs against the general rule whereunder self-acquired property may be alienated.

The first Court was wrong in holding that even if the land was acquired by Khem Singh it must be considered ancestral in this suit.

Assuming that Khem Singh acquired the land the question is not one of the meaning of ancestral property as regards collaterals, in which case such property is that inherited from the common ancestor *Balki and others v. Bira and others* ⁽¹⁾ and *Jowahir Singh v. Dial Singh and others* ⁽²⁾. In the present case and on the above assumption, the property, to be ancestral, must have been inherited by the fathers of plaintiffs from a direct male ancestor, in accordance with the *Mitakshara* law. "If a father
"under *Mitakshara* law is attempting to dispose of property, we
"enquire whether it is ancestral property. The answer to this
"question is that property is ancestral property if it has been in-
"herited as unobstructed property, that it is not ancestral if it
"has been inherited as obstructed property all
"property which a man inherits from a direct male ancestor, not
"exceeding three degrees higher than himself, is ancestral
"property But where he has inherited from a collateral
"relation, as for instance from a brother, nephew, cousin or uncle,
"it is not ancestral property, consequently his own descendants
"are not co-parceners in it with him. They cannot restrain him
"in dealing with it, nor compel him to give them a share of it."

(1) 43, P. R., 1890.

(2) 76, P. R., 1898.

(Mayne's *Hindu Law*, 6th Edition, pages 333–34, and authorities cited thereunder).

In the absence of proof of custom to the contrary the above rule is applicable, and if Khem Singh acquired the land plaintiffs have no power to restrain their father's alienation.

I am at one with the Divisional Judge in finding that Khem Singh acquired the land. There is no entry in revenue records to show that Baghel Singh ever held the land. Even as far back as 1852 Khem Singh is not shown as joint with Karm Singh, the grandfather of plaintiffs except in one holding out of several. At this period oral evidence is almost valueless.

Jhanda Singh, one of the plaintiffs, appears to have stated that Khem Singh acquired the land, and that statement has not been explained away.

The order of the Divisional Court dismissing the claim is affirmed and this further appeal is dismissed with costs.

Appeal dismissed.

No. 94.

Before Mr. Justice Reid.

HARBHAGWAN,—(PLAINTIFF),—APPELLANT,

Versus

SIAMUN AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 74 of 1901.

Punjab Land Alienation Act, 1900, Section 9 (3)—Effect of on appeals in suits for foreclosure of mortgages pending at the time the Act came into force.

Held, that sub-section 3 of Section 9 of the Punjab Land Alienation Act, 1900, does not apply to appeals filed in the Chief Court before the Act came into force.

Further appeal from the decree of Maulvi Inam Ali, Divisional Judge, Sialkot Division, dated 1st November 1900.

Golak Nath, for appellant.

The judgment of the learned Judge was as follows:—

REID, J.—Counsel for the appellant has very frankly brought to my notice the fact that Section 9 (3) of Act XIII, 1900 (Land Alienation Act, Punjab) might possibly be held to apply to this appeal, but the clause obviously applies only to proceedings prior to suit and to suits instituted, and possibly pending, after the Act came into force. The present suit was decided in July 1900 and the decree of the Lower Appellate Court was passed in

8th June 1901.

November 1900, while the appeal to this Court was filed in January 1901, before the Act came into force. The clause is therefore inapplicable.

(The remainder of the judgment is not material for the purposes of this report.—ED., P. R.).

No. 95.

Before Mr. Justice Chatterji.

APPELLATE SIDE. {

MUHAMMAD AYUB KHAN AND ANOTHER,—
(PLAINTIFFS),—APPELLANTS,

Versus

RURE KHAN AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

Civil Appeal No. 525 of 1901.

Pre-emption—Claim by a co-sharer—Right of a co-sharer who parted with his own property prior to the institution of suit and of one who acquired her share subsequent to the sale.

Where a sale of half share in five shops was made on 4th October 1898 and subsequently the owner of the other half share gifted all his property including his half share in the shops to his mother, and then jointly with his mother instituted a suit for pre-emption in respect of the above sale,

Held, that the son was not competent to sue as he had parted with his ownership before the suit, his rights being lost with the loss of the ownership by transfer and that the mother had no right to sue as the transfer of the property by gift to her could not confer on her any right to sue in respect of property which was sold before she had become owner of the property through which the right of pre-emption was claimed. *Scmble*: Right of pre-emption is personal and incapable of being assigned.

Further appeal from the order of Captain G. C. Beadon, Divisional Judge, Jullundur Division, dated 24th July 1900.

Madan Gopal, for appellants.

Muhammad Shah Din, for respondents.

The facts of the case and points of law are fully stated in the following judgment delivered by the learned Judge:—

8th June 1901.

CHATTERJI, J.—The material facts are briefly these. The property in suit, *viz.*, a half share in five shops in the village of Basti Sheikhan, was sold by the owner, Rure Khan, to Sheikh Ahmad and Jie Khan on 4th October 1898. Muhammad Ayub Khan, plaintiff, was the owner of the other half. He, on 18th July 1899, *i.e.*, after the sale, gifted all his property including his share in the shops to his mother Mussammat Lal Bibi. On 2nd October 1899 they jointly instituted this claim for pre-emption

on the ground of being relations of the seller and co-sharers in the property sold. The vendees are proprietors in the village.

The suit was thrown out by the first Court on the ground that Muhammad Ayub Khan had at the date of suit no ownership in the shops, consequently no right to sue, and that Mussammatt Lal Bibi had no claim as the sale took place before she acquired the ownership of the other half of the shops.

The Divisional Judge remanded the case for an inquiry into the question whether Muhammad Ayub Khan, as a relation of the vendor, had, by custom, a preferential right over the purchaser though he had no ownership in the village. The return was in his favour, but the Divisional Judge found the instances adduced by him inapplicable and decided the point against him. The learned Judge also agreed with the first Court's view as regards the rights of the two plaintiffs and dismissed their appeal.

On appeal before me the ground of relationship alone, without any ownership in the village, being sufficient to confer right of pre-emption, was abandoned by the learned counsel for the appellant. He attempted to argue that the mother might succeed as a relation, but this could not be supported on the record as, in the first place, she is a female and cannot come under the designation of *sharik* in the *Wajit-ul-arz* which applies only to male agnates, see *Mussammatt Rakhi v. Mussammatt Fatima and others* ⁽¹⁾ at page 308, and in the second, her relationship to the vendor otherwise than by marriage with Muhammad Ayub Khan's father is not established. This argument was therefore practically given up and I have besides no hesitation in overruling it.

There was not much argument as to Muhammad Ayub Khan being able to maintain the suit on the ground of having been a co-owner of the property at the time of the sale though he had parted with his ownership before the present suit was filed. I am of opinion that he is not competent to sue. His right of pre-emption here was not a purely personal one, but pertained to him as a co-owner also in the property sold, and was lost with the loss of the co-ownership by transfer. An authority is hardly needed to support this proposition, but the same view was taken in *Atma Ram v. Devi Dyal and another* ⁽²⁾, the facts of which were analogous and in which the question was discussed with some fulness, and it was pointed out that the case of *Sakina Bibi v. Amiran and others* ⁽³⁾ on which stress was laid by the plaintiff's

⁽¹⁾ 89, P. R., 1892.

⁽²⁾ 49, P. R., 1901.

⁽³⁾ I. L. R., X All., 472.

counsel was not applicable, the facts being different. It was held in *Janki Prasad v. Ishar Das* ⁽¹⁾, that in order that a suit for pre-emption may be successfully maintained, it was essential not only that a cause of action should arise to plaintiff at the time of sale which is the basis of the suit, but that it should subsist at the time the suit is brought. In *R-m Gopal v. Piari Lal* ⁽²⁾, the principle was carried still further and it was held that the loss of the interest in the property on which the right of pre-emption was based subsequent to the institution of the suit was fatal to it. In the present instance Muhammad Ayub Khan had no right of action left in him at the time of institution of the suit, he having already parted with his co-ownership in favour of his mother. These authorities are therefore decisive so far as his claim is concerned. I have no difficulty therefore in rejecting his appeal.

Mussammat Lal Bibi, the other plaintiff, is not to my mind in a better position. She had no interest in the shops before the date of the gift, *i.e.*, when the sale took place. No cause of action then accrued to her. The vendor was not bound to make an offer to her under Section 13 of the Punjab Laws Act and she could not in her plaint make any of the averments which Section 16 of the Act requires a plaintiff claiming pre-emption to make. The proposition is to my mind self evident and a Full Bench decision of the Allahabad High Court, *Shro Narain v. Hira* ⁽³⁾, appears to exactly cover it. There it was held that a person purchasing a share-holder's interest in a village cannot claim pre-emption as such under the *Wajib-ul-arz* in respect of a sale which took place before he acquired his interest, as his vendor might have done. The consequences of admitting that he has a right to sue under such circumstances are ably discussed by Mr. Justice Mahmud, and I have no hesitation in expressing my agreement with his reasons. The present case is, if possible, a stronger one with reference to the provisions of the Punjab Laws Act already adverted to.

The only ground on which Mussammat Lal Bibi's *locus standi* can be maintained is that she is clothed with the rights which were possessed by the donor Muhammad Ayub Khan. Reliance was placed in the argument on a judgment of the Allahabad High Court, *Muhammad Yusuf Ali Khan v. Dal Kaur* ⁽⁴⁾, in which it was ruled that where a Hindu widow in possession of her husband's share in a village relinquished it in favour of her daughter, the latter was entitled to pre-emption in respect of a sale which had taken place in the village prior to the relinquishment. I have

⁽¹⁾ *Weekly Notes*, 1899, p. 127.

⁽²⁾ *I. L. R.*, XXI All., 441.

⁽³⁾ *I. L. R.*, VII All., 535.

⁽⁴⁾ *I. L. R.*, XX All., 148.

considerable difficulty in accepting the view of the learned Judges in that case and it appears to me to be to a certain extent distinguishable, in that the Hindu widow's estate though plenary for certain purposes is, in essence, an estate of maintenance and a residuary interest in it remains vested in the reversioners which can be turned into an estate of possession by relinquishment by her of her rights. A consideration of the fundamental principles which govern and regulate the right of pre-emption leads me to the conclusion that the right is not properly speaking a right *to* or *in* any property. It ordinarily accrues no doubt by virtue of the claimant being owner of other immovable property which is specially situated with reference to that sought to be pre-empted, but even this is not absolutely indispensable. One can conceive, as was argued in this very case and found by the first Court on remand, that a relation of the vendor without possessing any property in the village in which the property sold is situate may be entitled by custom to claim pre-emption though such instances are unknown. But relationship frequently forms a very important element in giving rise to the right of pre-emption, more especially in villages. So far the right is undoubtedly personal and incapable of being assigned. For example in a village held on ancestral shares if a proprietor alienates his land to an outsider, the vendee's position as a pre-emptor is markedly different from that of his vendor. He cannot succeed to the latter's rights as a relation with respect to land held by his agnates. It is also not a substantive right in property which is capable of transfer. It is ordinarily attached to, and dependent on, ownership of other property in the locality, but is not a vested or unconditional right in the property subject to the claim, and in this respect differs from an easement which is incapable of transfer apart from the tenement to which it pertains, but capable of transfer with it. It is not *Jus in re alima*, but *Jus ad rem aliam acquirendam*. It merely is a burden or restriction on the right of alienation of the owner of the property subject to the right, and only comes into being when a transfer takes place and the possessor elects to comply with all the conditions necessary to bring it into actual existence. Until that moment no right attaches to the property sought to be pre-empted. In other words the primary right of the pre-emptor is that an offer should be made to him when the property subject to the right is about to be transferred. He is not bound to accept the offer, and when he does so, or even gets a decree, he still has no interest of any kind in the property itself until he pays the price fixed within the appointed time. It follows that up to that moment he has no right which he can convey to others, and that a

bare right of pre-emption is not transferable. The whole subject is most exhaustively discussed in *Lhani Nath v. Budhu and others* ⁽¹⁾, in the very able judgment of Sir Meredyth Plowden, and I content myself with simply referring to it in support of my position. The learned Judge points out that the transfer of a right of pre-emption confers no such right in respect of the property subject to it, but merely amounts to a contract between the parties by which the transferor agrees to waive his claim in favour of the transferee which may be enforced against him. A similar view appears to have been taken also by the Allahabad High Court, *Ram Sahai v. Gaya* ⁽²⁾, at page 110, citing a previous unreported judgment of the Court in which the claim of the transferee of a decree for pre-emption to execute it was disallowed. If a decree obtained for pre-emption cannot be conveyed to another so as to clothe him with the rights of the pre-emptor, *à fortiori* the right, before it is ascertained and defined by judicial adjudication, is incapable of transfer. I therefore hold that the transfer of the property by gift to Mussammat Lal Bibi did not, and could not, confer on her any right to sue for pre-emption in respect of the property in dispute which was sold before she acquired her ownership. I may here also mention that the deed of gift itself contains no mention of the right nor purports to convey it to the donee.

Mussammat Lal Bibi's claim is thus untenable.

The appeal is dismissed with costs.

Appeal dismissed.

No. 96.

Before Mr. Justice Harris.

BULAKI MAL,—(PLAINTIFF),—APPELLANT,

Versus

T. G. ACRES,—(DEFENDANT),—RESPONDENT.

Civil Appeal No. 1228 of 1897.

Undue influence—Penalty—Unconscionable bargain—Interest—Contract Act, 1872, Sections 16, 74—Act XXVIII of 1855, Section 2.

In the absence of evidence that the parties to a bond were not on an equal footing or that the obligor did not fully understand the transaction, or was in the clutches of an extortionate money-lender, the mere fact that the rate of interest was high is insufficient to raise a presumption of undue influence such as is contemplated in Section 16 of the Contract Act. When under the terms of a bond the interest chargeable cannot be regarded as a penalty, the terms of the bond must be enforced. Indian Courts

⁽¹⁾ 136, P. R., 1894. ⁽²⁾ I. L. R., VII All., 107.

APPELLATE SIDE. }

cannot interfere at discretion merely on the ground that a bargain is hard and unconscionable.

Gokal Chand v. Khwaja Ali Shah ⁽¹⁾ followed *Edulji v. McDonald* ⁽²⁾ referred to.

Further appeal from the order of Qazi Muhammad Aslam, Divisional Judge, Lahore Division, dated 11th August 1897.

Lajpat Rai, for appellant.

Browne, for respondent.

The judgment of the learned Judge was as follows:—

HARRIS, J.—The bond on which the present suit is based is of *8th June 1901.*
the 24th March 1895 and runs as follows:—

“Borrowed from Bulaki Mal the sum of Rs. 1,500 only payable on the 6th October 1895. Interest for the period has been paid in advance and included in the above sum at the rate of Rs. 3 per cent. per month. If the amount will not be paid on the date quoted above, interest at the rate of Rs. 3 per cent. per month will remain going on till the date of its payment, and the amount will be paid at once on demand.”

The bond appears to have been written by the defendant himself. According to endorsements thereon Rs. 100 were paid to interest on the 4th June 1896, and a further like sum on the 11th September 1896. The suit was instituted for Rs. 1,500 principal and Rs. 765 interest on the 25th March 1897. Plaintiff calculated interest at Rs. 3 per cent. per month from the 6th October 1895 the date of default, crediting the above mentioned Rs. 200 to interest.

Proceedings in the first Court were *ex-parte*, but the exorbitant rate of interest was there held to presume undue influence, and interest at the rate of Re. 1 per cent. per month only was allowed, and Rs. 1,559-8-0 decreed with proportionate costs.

On appeal by plaintiff in the Divisional Court the defendant was represented, and the view taken by the first Court that defendant was unduly influenced in agreeing to so high a rate of interest was concurred in by the Divisional Judge and the appeal dismissed with costs.

In further appeal here by plaintiff for the balance of claim undecreed it is fairly urged, as was urged in the Divisional Court, that the first Court was wrong, in the absence of any plea by defendant, in assuming merely from the high rate of interest that there had been undue influence.

(1) 32, P. R., 1890. (2) 55, P. R., 1901.

Defendant is an European, and was, at the time of executing the bond with his own hand, an Assistant Traffic Superintendent on the North-Western Railway. In the absence of any plea or evidence that he was then in the clutches of an extortionate money-lender the mere fact that the rate of interest was high is manifestly insufficient to raise a presumption of undue influence such as is contemplated in Section 16 of the Indian Contract Act.

Further under the terms of the bond the interest chargeable cannot be regarded as a penalty. It is true the bargain was a hard one, the interest for over six months being paid in advance and the rate of interest being high. But in case of default further interest was only made payable at the same rate from the date of default. "A stipulation that the debtor shall, on default in paying up the principal at a certain time, pay for the future compound interest or interest at a higher rate, is not penal in its character, and does not come within the section (*i.e.*, Section 74, Indian Contract Act). There is in such cases no sum named to be paid in case of a breach, but if the borrower chooses to retain the money longer, he agrees to pay a higher consideration for it." (Cunningham and Shephard's *Indian Contract Act*, 8th Edition, pages 227-28 and authorities cited therein).

"The mere fact that the terms are exorbitant is by itself no reason for not enforcing an agreement. It is only when to this fact is added the circumstance that the parties were not on an equal footing, or that the party seeking relief did not fully understand the transaction, that the Court will give relief" (*idem*, p. 229).

In this case the interest was not enhanced, defendant certainly understood the transaction, and there is nothing on the record to point to inequality of footing.

On the question whether the Courts in this country can interfere at discretion merely on the ground that a bargain is hard and unconscionable, I am not aware of any ruling of this Court disapproving of the dictum in *Gokal Chand v. Khwaja Ali Shah* (1) where it was held that the Indian Courts had no such discretionary power. *Edulji v. McDonald* (2) cited by counsel for defendant, has no application to the present case. Under Section 2, Act XXVIII of 1855 "in any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate, if any, agreed upon by the parties," a provision which of course is subject to the provisions of the Contract Act as regards undue

(1) 32, P. R., 1890. (2) 55, P. R., 1901.

influence and penalty. But as is indicated above the present case is one neither of undue influence nor penalty, and the terms of the bond must be enforced.

For the above reasons the appeal is accepted and the sum of Rs. 505-8-0, the undecreed balance of interest claimed, is added to the decree for Rs. 1,559-8-0, making the whole decree one for Rs. 2,065.

It is said that defendant has up to date paid nothing towards the decree, but I think the transaction was oppressive in its terms, and I would and do allow no more costs than were allowed by the first Court, *i.e.*, costs on Rs. 1,559-8-0 of the first Court. Other costs in the first Court and costs in this and in the Divisional Court are to be borne by the parties.

Appeal allowed.

No. 97.

Before Mr. Justice Clark, Chief Judge.

PIRAN DITTA,—(PLAINTIFF),—PETITIONER,

Versus

MOTI AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Revision No. 889 of 1901.

REVISION SIDE.

Custom—Alienation by male proprietor—Necessity—Antecedent just debts.

In a case where a minor son sued to set aside his father's alienations on the ground of non-receipt of consideration and want of necessity, *held*, that the father having himself admitted receipt of consideration and having given possession and mutation of names raised a strong presumption that consideration had been received, and as regards necessity, it being shown that the father had only a small estate and large expenses, and it not being shown that he lived in an extravagant way, the previous debt to the vendee should be held to have been incurred for the usual necessary requirements of an agriculturist.

Petition for revision of the decree of A. E. Hurry, Esquire, Divisional Judge, Lahore Division, dated 21st February 1901.

Shahab-ud-din, for petitioner.

The judgment of the learned Chief Judge was as follows:—

CLARK, C. J.—This is one of that now common class of cases 21st June 1901. in which a minor son tries to set aside his father's alienation on the ground of non-receipt of consideration and want of necessity on the part of the father.

The alienations were—

- I. A sale of 104 *kanals* land for Rs. 700 on 26th May 1892,
- II. A sale of 46 *kanals* land for Rs. 400 on 14th August 1893,

Possession was given under the sales. Plaintiff's father Ladha died in 1894 and plaintiff sues for possession in 1897.

The consideration for the first sale is alleged to have been as follows:—

	Rs.	a.	p.
1. Previous bond for price of a bullock, dated 19th September 1889	53	0	0
2. Price of a buffalo, dated 30th July 1890	71	0	0
3. Previous mortgage-deed of 64 <i>kanals</i> , dated 5th February 1891	198	0	0
4. Price of a bullock	65	0	0
5. Cash for payment to Jiwan	42	8	0
6. Price of fodder	29	8	0
7. Price of buffalo	85	0	0
8. Cash paid	156	0	0
Total	700	0	0

The consideration for the second sale is alleged as follows:—

	Rs.	a.	p.
9. Due on a previous mortgage-deed filed	120	0	0
10. Cash paid to be paid at <i>dekhl kharij</i>	161	0	0
11. Cash	29	0	0
12. A buffalo value	90	0	0
Total	400	0	0

The first Court, Khan Bahadur Din Muhammad, found that the sales were for consideration and necessity.

The Divisional Judge, Rai Bahadur Buta Mal, after a remand agreeing with the report of Rai Bhagwan Das, Extra Assistant Commissioner, found that only items 1, 6 and 8 were proved to have been paid, and decreed possession subject to a payment of Rs. 238 only.

On appeal this Court remanded the case for fresh decision of the appeal, saying that the vendor was living with his family and is not shown to have been immoral or a spendthrift, presumably he did the best he could for his family and himself, he appears to have had a wife, 2 daughters and 2 minor sons, to have been a very poor man, he owned some 40 *ghumaos* land of which only 5 *ghumaos* was cultivated, and this was mortgaged, so that he must have had little or no income, he appears to have tried to obtain an income by working a cart. The Divisional Judge was directed to decide the appeal with reference to above remarks and to rulings Nos. 11, 14 and 46 of 1899.

Rai Bahadur Buta Mal, Divisional Judge, ordered a further remand in the case, the enquiry was made by Mr. Jowala Sahai, who found all the items advanced except Nos. 3, 5, 12 proved as paid and for necessity, and found Rs. 769 as due on the deeds.

The Divisional Judge, Mr. Hurry, held that it was sufficiently proved that all the items were received and for necessity and dismissed the suit.

Plaintiff has now applied for revision on the ground that the Divisional Judge has drawn wrong inference from the evidence.

Granting that a revision may lie on such grounds I think the Divisional Judge was warranted in drawing the inference he did.

As regards receipt of consideration, Ladha himself admitted receipt of consideration and gave possession and mutation of names. This in itself is *primâ facie* proof that Ladha received consideration. Ladha is not shown to have had any motive for admitting receipt of consideration which he had not received, he was apparently managing a small estate as best he could in the interests of himself and family.

As regards necessity. It will be observed that all the items in the first sale were previous debts except the item of Rs. 156 cash which is proved to have been spent on a bullock and cart with which Ladha earned his living.

Though some of the previous debts were due to the vendee, plaintiff has failed to show that the vendor was living in an extravagant way, and under the circumstances it is sufficiently proved that the items were taken for usual necessary requirements of an agriculturist.

The same remarks apply to the second sale, the cash item there is proved to have been taken for a cart and bullock. I think that the sales have been rightly maintained and I dismiss the revision.

Application dismissed.

No. 98.

Before Mr. Justice Reid.

APPELLATE SIDE. }

SRI RAM AND ANOTHER,—(DECREE-HOLDERS),—
APPELLANTS,*Versus*MAJID-UD-DIN AND OTHERS,—(JUDGMENT-DEBTORS),—
RESPONDENTS.

Civil Appeal No. 903 of 1900.

Execution of decree—Application for execution not in accordance with law—Step in aid of execution—Limitation—Limitation Act, 1877, Schedule II, Article 179.

An application for execution of a decree not in accordance with the terms of the decree is not a step in aid of execution as contemplated by clause 4, Article 179 of the second schedule of the Limitation Act, 1877.

Further appeal from the decree of D. C. Johnston, Esquire, Divisional Judge, Amballa Division, dated 2nd October 1899.

Muhammad Shah Din, for appellants.

The judgment of the learned Judge was as follows :—

22nd June 1901.

REID, J.—The question for consideration is whether the execution sought is barred by Article 179 of the Limitation Act.

The decree sought to be executed was passed on the 23rd November 1893, for recovery of Rs. 427-8-0 from mortgaged land.

Costs were not allowed, but on appeal the decree-holder obtained a decree for costs on the 3rd May 1894.

On the 14th November he applied for execution of the whole decretal amount, Rs. 427-8-0 and costs, against moveable property of the judgment-debtors. This application was dismissed in default on the 15th May 1895, without issue of notice to the judgment-debtors. On the 21st February 1896 a similar application was made and was rejected on the ground that it was not, in accordance with the terms of the decree, for recovery from the land mortgaged. This objection was taken by the judgment-debtor.

On the 16th May 1898 the application under consideration was made in due form under the terms of the decree. In *Huro Sunkur Sandyal v. Taruck Chunder Bhuttacharjee* ⁽¹⁾, a case of an application by one of several decree-holders for execution of his own interest, Peacock, C. J., said, "After the decree is perfect for execution in its entirety, as for instance in the case just put, after the *wasilat* had been assessed and fixed, I apprehend

⁽¹⁾ 11, W. R., 488.

“ that the execution creditor cannot take out one execution for
 “ the *vasilat*, another for the costs, and another for the interest on
 “ the costs further, I hold that if a decree be seized in
 “ execution the whole decree must be seized and sold together, and
 “ that it cannot be seized in portions and sold in portions under an
 “ execution. At any rate, if this could be done, the judgment-debtor
 “ cannot be made to suffer any loss by having the decree executed
 “ against him in several portions.” Jackson, J., said, “ I think that
 “ a decree cannot be executed in portions.” In *Ponnampilath*
Parapravan Kuthath Haji v. Pannampilath Parapravan Barotti
Haji ⁽¹⁾, Turner, C. J., and Muttusami Ayyar, J., held that an
 application by one of several decree-holders would keep the decree
 alive though the application could not be granted, being for the
 applicant's own interest. It was further held that such an
 application would be according to law.

In *Pandari Nath Bapuji v. Lila Chand Hatibhai* ⁽²⁾, Bird-
 wood and Parsons, JJ., held that, a decree having been passed for
 payment of Rs. 156 within one month by the defendant to the
 plaintiff and for the execution of a deed of sale by the latter in
 favour of the former, an application by the plaintiff for the
 absolute delivery of a house, not given to him by the decree,
 was bad and could not keep alive the decree, as no effect could be
 given to it until it was substantially amended by substituting
 an entirely new prayer.

In *Dalichand Bhudar v. Bai Shirkor* ⁽³⁾, Sargent, C. J., and
 Candy, J., held that an application for execution as to costs only,
 the decree having given certain ornaments and costs, would not
 save limitation, although the decree-holder stated in her appli-
 cation that she would subsequently apply for delivery of the
 ornaments, inasmuch as “ a step in aid of execution ” could not be
 construed to mean an act contrary to the provisions of Section
 234 of the Code of Civil Procedure which *ex-hypothesi* was the
 character of the application.

The Court held, however, that the judgment-debtor could
 not plead that an application made within three years of that
 described above was not within time, having allowed that appli-
 cation to be granted and paid the costs applied for.

In *Nepal Chandra Sadookhan v. Amrita Lall Sadookhan* ⁽⁴⁾,
 Maclean, C. J., and Banerjee, J., professing to follow the XV
 Bombay ruling, held that a similar application for recovery of costs,

⁽¹⁾ I. L. R., III Mad., 79.

⁽³⁾ I. L. R., XV Bom., 242.

⁽²⁾ I. L. R., XIII Bom., 237.

⁽⁴⁾ I. L. R., XXVI Cal., 888.

which stated that so much of the decree which gave immoveable property would be subsequently executed, “was one to take some step in aid of execution, and seeing that the judgment-debtor raised no objection at the time to the decree being executed piecemeal—not, I admit, a desirable way of executing a decree,—it does not now lie in his mouth to say that the “application was not in accordance with law.”

The difference between the words, “some step in aid of execution” in this judgment and “applying in accordance with law to the proper Court to take some step in aid of execution,” is noticeable.

Counsel for the appellant contended that the Court should have allowed the application of February 1896 to be amended. No application for permission to amend appears to have been made. On the contrary, the decree-holder stated that he had forgotten the terms of the decree and would make another application, limitation for which would not expire for several months, and it is obvious that he accepted the ruling of the Court that his application was not in accordance with law, and intended to make an application in due form. No change has been made in the law since the XV Bombay judgment was delivered in 1890, and I see no reason for not following it, based as it is on a dictum of Peacock, C. J., which, though to a certain extent *obiter*, forms part of the *ratio decidendi* and is entitled to great weight. The III Madras ruling is not exactly in point, and as already remarked the words used in XXVI Calcutta differ from those in Article 179 of the Limitation Act and the Court professed to follow XV Bombay.

For these reasons I concur with the Lower Appellate Court in holding that the application for execution of the 16th May 1898 was beyond time. The appeal fails and is dismissed with costs, but, inasmuch as the respondents were not represented, no pleader’s fee is allowed to them.

Appeal dismissed.

No. 99.

Before Mr. Justice Maude.

SOBHA SINGH,—(DEFENDANT),—APPELLANT,

Versus

LORINDA MAL AND ANOTHER,—(PLAINTIFFS),—
RESPONDENTS.

Civil Appeal No. 356 of 1901.

Contract—Sub-letting contract, what is—Assignment—Illegality of assignment of or sub-letting of contract as opposed to public policy.

APPELLATE SIDE. }

A contract by which the plaintiffs agreed to supply the Commissariat authorities with certain *bhusa* contained a recital to the effect that the contract was not to be sub-let, although it could be transferred with the approval of the official by whom it was sanctioned. Subsequently the plaintiffs entered into an agreement with the defendant, under which the defendant was actually to supply the *bhusa* to the Commissariat Department, paying the plaintiffs one anna for each rupee's worth supplied. The defendant made default, and the plaintiffs had to perform their contract, and thereby incurred an alleged loss of Rs. 221 for which they sued the defendant. The first Court found that the agreement between the parties was void as being opposed to public policy and dismissed the suit.

Held, that the defendant was not entitled to avoid fulfilling the terms of his agreement with the plaintiffs on the ground that it was opposed to public policy, merely because the plaintiff had done something which under the terms of their contract with the Commissariat Department they possibly should not have done. Where two parties, competent to contract, have formally entered into an agreement, one of them cannot be permitted to get rid of his obligation unless the plea that the object of the agreement is opposed to public policy is thoroughly well substantiated.

Printing and Numerical Registration Company v. Sampson (1) cited.

Miscellaneous further appeal from the decree of Sardar Sultan Jan,

Saddozai, Sub-Judge, Kohat, dated 27th March 1901.

Sangam Lal, for appellant.

Ishwar Das, for respondents.

The judgment of the learned Judge was as follows:—

MAUDE, J.—The material facts in this case are as follows:—
The plaintiffs entered into a contract with the Commissariat authorities agreeing to supply a certain quantity and quality of *bhusa* during a specified period. The plaintiffs then entered into a contract with the defendant, under the terms of which it was agreed that the defendant should supply the *bhusa* to the Commissariat Department, paying the plaintiff one anna for each rupee's worth supplied.

The plaintiffs alleged that the defendant had failed to supply the *bhusa*, and that they had had to do so instead, thereby incurring a loss of Rs. 221-8-0 and they sued to recover Rs. 220. The Munsiff held that the agreement between the parties was void as being opposed to public policy and dismissed the suit, but on appeal the Subordinate Judge dissented from that finding, and holding that the agreement constituted a valid contract, remanded the case under Section 562 of the Code of Civil Procedure for a fresh decision on the merits. From this order an appeal has been preferred by the defendant under Section

29th June 1901.

(1) 44, L. J. Ch., 705.

588 (28) of the Code, and under the Full Bench ruling of this Court, *Bhai Wazira v. Chuhar Mal* ⁽¹⁾, it is necessary to decide whether the view held by the Subordinate Judge is or is not correct.

The Munsiff has referred to paragraph 1423 of Volume V of the Army Regulations, India, as prohibiting the making of sub-contracts, and has explained the object of this rule as being to "insure that Government shall know with whom it is dealing definitely, and thus be able to choose suitable contractors," and as "the effect of the sub-contract is to defeat this excellent object," it is argued that the agreement must be opposed to public policy. Apparently paragraph 1423 is what it was intended to refer to, which runs as follows;—"Contracts are not under any circumstances to be sub-let, but they may be transferred with the approval of the Commissary-General when they are sanctioned by him or by Government, and of the Chief or Executive Commissariat Officer when they are sanctioned by him." The contract entered into between the plaintiffs and the Commissariat Department is not on the record, but it is stated in the first Court's judgment, and the statement has not been traversed in this Court, that a clause to the same effect as the rule laid down in the Army Regulations is printed on every Commissariat contract. It may be assumed then that the plaintiffs had knowledge of the rule before their agreement was entered into with the defendant. But neither the paragraph in question nor the plaintiffs' knowledge of it supports the view that their agreement with the defendant is opposed to public policy and therefore void. It is not quite clear what the word "sub-let" in the paragraph of the Army Regulations is intended to mean, but I see no reason for supposing that it is used to express more than that a contract may not be *assigned* to a third party, that is to say, a party entering into a contract with the Commissariat Department cannot be allowed to substitute another person's liability for his own, without the consent of the responsible authorities of the Department. This of course is in accordance with the general principle that the liability on a contract cannot be transferred so as to discharge the person or estate of the original contractor, unless the other party agrees to accept the liability of another person. But in the present case it has not been contended that the plaintiffs attempted to discharge themselves of liability to the Commissariat Department to carry out the contract, and from the nature of it, it clearly was not the intention of the contracting parties that the promise made

(1) 85, P. R., 1895, F. B.

by the plaintiffs should be *personally* performed by them; they were obviously entitled under Section 40 of the Indian Contract Act to employ competent persons to perform the contract.

I can discover, then, no ground for holding that the object of the agreement between the parties to this suit was opposed to public policy. In the case of the *Printing and Numerical Registration Company v. Sampson* ⁽¹⁾, Sir George Jessel, M. R., observed that “if there is one thing which more than “another public policy requires, it is that men of full age and “competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and “voluntarily, shall be held sacred and shall be enforced by “Courts of Justice. Therefore, you have this public policy “to consider—that you must not lightly interfere with “this freedom of contract.” It is difficult to conceive how in the present instance the interests of the public could have been in any way prejudicially affected by the terms of the agreement between the plaintiffs and defendant. The appeal is dismissed with costs.

Appeal dismissed.

No. 100.

Before Mr. Justice Robertson and Mr. Justice Harris.

RADHA MAL,—(PLAINTIFF),—APPELLANT,

Versus

MUSSAMMAT KIRPI AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 275 of 1899.

Custom—Inheritance—Widow of predeceased son—Gahi Khatri of Aklaba, Ludhiana District—Hindu Law—Mitakshara.

In a case the parties to which were non-agricultural Khatri of village Aklaba in the Ludhiana District, held in the absence of a special custom that succession was to be decided by the *Mitakshara*, under which law, as applicable to the Punjab, the widow of a predeceased son has no right to succeed to her father-in-law's property.

Held also, that the defendant upon whom the *onus probandi* rested had failed to prove that she (a daughter-in-law, whose husband had predeceased his father) was entitled by custom to succeed to her father-in-law's property.

(1) 44, L. J. Ch., 705.

Teja Singh v. Mussammat Atri ⁽¹⁾, *Mussammat Rup Kaur v. Kishen Singh* ⁽²⁾, *Sohna v. Mussammat Bhago* ⁽³⁾, *Bahadar Singh and others v. Mussammat Nihali* ⁽⁴⁾, *Ananda Bibee v. Nownit Lall* ⁽⁵⁾, *Jogadamba Koer v. Secretary of State for India in Council* ⁽⁶⁾, *Gauri Sahai v. Rukko* ⁽⁷⁾, and *Mari v. Chinnam Mal* ⁽⁸⁾, followed. *Lallubhai Bapubhai v. Cassibai* ⁽⁹⁾ and *Madhavram Mujutram v. Dave Trambaklal Bhurcanishankar* ⁽¹⁰⁾, disapproved. *Mussammat Chand Kaur v. Ram Singh and others* ⁽¹¹⁾, distinguished.

Further appeal from the decree of A. Kensington, Esquire, Additional Divisional Judge, Umballa Division, dated 19th December 1898.

Lajpat Rai, for appellant.

Lal Chand, for respondents.

The judgment of the Court was delivered by

3rd July 1901.

HARRIS, J.—The facts have been dealt with at some length by the Courts below. Parties are members of a Khatri family of Aklaba, a village in the Ludhiana District, and are admittedly not agriculturists. The evidence as to the correctness of the family pedigree table put in by plaintiff has not been rebutted, and it is not seriously urged that the table is incorrect.

Plaintiff sued as one of the collaterals of Deviditta Mal, deceased, for his share by Hindu Law or custom in Deviditta's estate. The principal defendant is Mussammat Kirpi, the widow of Rullia Mal, who predeceased his father Deviditta Mal. The other collaterals were made *pro formâ* defendants.

Mussammat Kirpi pleaded that by custom she was entitled to succeed; that Deviditta Mal orally willed the estate to her; that the property was jointly acquired by Deviditta Mal and her husband. She also disputed the correctness of the list of property given by plaintiff, and contended that plaintiff was estopped by his conduct from denying her title.

The first Court held that under Hindu Law the widow of a predeceased son has no right to succeed in the presence of collaterals, and, placing the *onus* on the widow, found that it had not been proved that by special custom the widow of a predeceased son excluded the collaterals. It was further found that no oral will had been proved, and that plaintiff was not shown to be estopped.

The major portion of the claim was decreed, and Mussammat Kirpi and plaintiff both appealed.

⁽¹⁾ 115, P. R., 1893.

⁽²⁾ 9, P. R., 1895.

⁽³⁾ 50, P. R., 1897.

⁽⁴⁾ 133, P. R., 1893.

⁽⁵⁾ I. L. R., IX Cal., 315.

⁽⁶⁾ I. L. R., XVI Cal., 367.

⁽⁷⁾ I. L. R., III All., 45.

⁽⁸⁾ I. L. R., VIII Mad., 107.

⁽⁹⁾ I. L. R., V Bom., 110.

⁽¹⁰⁾ I. L. R., XXI Bom., 739.

⁽¹¹⁾ 20, P. R., 1895.

In appeal the Divisional Judge, while agreeing with the first Court that under Hindu Law Mussammat Kirpi was not entitled to succeed, said "There is no reason for supposing that the parties have any knowledge of strict Hindu Law, or are ordinarily governed by its tenets in the affairs of their family life. I take it that Mussammat Kirpi's rights as heir are determined by custom only, and what that custom may be is nowhere clearly laid down." The Divisional Judge further found the property in suit to have been, as regards the collaterals, the self-acquired property of Deviditta Mal, and held that by custom Mussammat Kirpi was entitled to hold the estate for life. On the above findings the Divisional Judge accepted Mussammat Kirpi's appeal, and dismissed plaintiff's claim without deciding definitely the other points arising in the appeals.

In this further appeal by plaintiff it is contended for appellant that no special custom applicable to the family of the parties, whereunder the widow of a predeceased son excludes collaterals such as plaintiff, has been established, that Hindu Law is therefore to be followed, and that under Hindu Law the widow of a predeceased son has no rights, whether the property is ancestral or self-acquired.

For respondents it is urged that even if the *onus* as to custom was properly placed on the widow, the instances produced discharged that *onus*; that Deviditta Mal left a daughter whose presence would exclude the collaterals; that by Hindu Law, properly interpreted, the son's widow succeeds; that the son Rallia Mal was joint with his father, and that Mussammat Kirpi succeeded to her husband's share on his (Rallia Mal's death); that plaintiff admitted Mussammat Kirpi's claim to succeed.

It is admitted that Deviditta Mal left a widowed daughter Mussammat Asa Devi, and the fact was mentioned by plaintiff in the first Court. But though plaintiff to succeed must prove his title, we cannot allow the existence of a daughter to be pleaded here for the first time as a bar to plaintiff's claim, that fact not having been pleaded either in the first Court or in the widow's appeal. The widow has throughout been asserting her own title against the world. Besides it has not been definitely argued for the widow that she would be excluded by the daughter, and at least one text has been put forward for her by her counsel which would, if followed, postpone the daughter to the son's widow (*Vaijayanti* by Nanda Pandita. See Sarvadhikani's *Hindu Law of Inheritance*, Tagore Law Lectures, 1880, at page 479).

Though as regards collaterals the property in suit is clearly self-acquired, there is no evidence to show that Rallia Mal was joint with his father in any act of acquisition. According to Mussammat Kirpi's own statement Rallia Mal was about 15 years of age when he died. Nor is there evidence to establish the doubtful contention that Mussammat Kirpi was joint in estate with her father-in-law. We can find no admission or conduct of plaintiff such as estops him from claiming.

The evidence of payment of *neota* leaves it indefinite whether plaintiff paid to Jiwan Mal for Mussammat Kirpi, or for some one of the collaterals who was performing the funeral ceremony.

We think the first Court has correctly weighed the evidence surrounding the above fact, and no undue delay in suing is disclosed.

On the question of custom we should not be disposed to depart from the *onus* laid down in *Teja Singh v. Mussammat Atri* ⁽¹⁾, which has been followed in *Mussammat Rup Kaur v. Kishen Singh* ⁽²⁾, and *Sohna v. Mussammat Bhago* ⁽³⁾, in the matter of succession of a son's widow in the presence of collaterals. With the exception of *Bahadur Singh and others v. Mussammat Nihali* ⁽⁴⁾, in which the *onus* was held to have been discharged, the reported cases in favour of a son's widow are all of Muhammadans, C. A. No. 2082 of 1881 of this Court and *Mussammat Chand Kaur v. Ram Singh and others* ⁽⁵⁾, which rulings have been here cited for respondent, being inapplicable. But the above rulings as well as the custom expressed at page 58, Customary Law of Ludhiana, proceed upon an interpretation of customary law applied to agriculturists. The parties here are admittedly non-agriculturists, and the above rule as to *onus* does not operate. But as the family is one of trading Khatris, the rule of succession is Hindu Law, if no custom applicable to the parties is shown to exist, and it was for the son's widow to prove any special custom alleged by her, and the fact that the property in suit is not ancestral does not relieve her from having to show such custom exists.

It would seem that the Divisional Judge arbitrarily decided that the son's widow was by custom entitled to a life-interest without discussing the instances adduced.

As to those instances we think that the general assertion by one or two witnesses that Brahmins and Khatris have one custom-

⁽¹⁾ 115, P. R., 1893.

⁽³⁾ 50, P. R., 1897.

⁽²⁾ 9, P. R., 1895.

⁽⁴⁾ 133, P. R., 1893.

⁽⁵⁾ 20, P. R., 1895.

ary rule of succession is of little weight, and that the instances which have been adduced of Brahmin families of other villages should be put out of consideration. Nor are we inclined to treat the cases of a son's widow succeeding to a share together with her husband's brothers as directly in point, for while such cases cannot be regarded as wholly irrelevant, they are certainly distinguishable from those in which the widow gets control of the whole estate.

Of the seven Khatri instances cited in oral evidence two (*viz.*, those of Mussammat Kirpi of Bahrapur and Mussammat Parmeshri of Ismailpur) are of widows alleged to have succeeded to their husbands' share along with husbands' brothers.

The other instances are : (1) of Mussammat Jatan of Aklaba (the village of the parties) ; (2) Mussammat Naraini of Machhiwara ; (3) Mussammat Jaidevi of Nabha State ; (4) Mussammat Radhi ; (5) Mussammat Nihali. It is to be remarked that the above instances rest upon oral evidence, and have been only imperfectly ascertained.

Mussammat Jatan appears to have succeeded to a mortgagee's rights in 14 *bighas* of land which, as observed in the first Court's judgment, might be regarded as requisite for her maintenance. In Mussammat Naraini's case it would seem that there were no proved collaterals. The Nabha instance of Mussammat Jaidevi is considerably discounted by the fact that the collaterals are said to have received a share in the life-time of Mussammat Jaidevi's father-in-law, in which case the succession of the son's widow to the reserved share with the consent of the *bradari* was merely for her maintenance. In Mussammat Radhi's case there seems to have been a will and consent of the brotherhood, but the evidence as to that instance and to that of Mussammat Nihali is most scanty, and cannot be said to have ascertained the facts.

Thus though we are disposed to think the *onus* should not rest too heavily on the son's widow in this case, and though no instances of her exclusion have been cited, we are unable to find that the special custom set up has been established. The custom was pleaded as one in the family, or at least in the *gôt* (*Gahi*), and no one instance of the family or in the *gôt* has been cited, while, as disclosed above, not one ascertained instance has been adduced of succession of the son's widow to the whole estate in opposition to the collaterals.

It remains to be considered whether the daughter-in-law succeeds under the Hindu Law applicable to the parties *i.e.* the

Mitakshara, and the determination of that question appears to rest upon which interpretation of that law we are prepared to accept as correct, *viz.*, that of the Bombay High Court. *Lallubhai Bapubhai v. Cassibai* ⁽¹⁾, *Madhurram Mujutram v. Dore Tribaklal Bhawanishankar* ⁽²⁾, or that of the other High Courts in India *Ananda Bibee v. Nounit Lal* ⁽³⁾, *Jogadamba Koer v. Secretary of State for India in Council* ⁽⁴⁾, *Gauri Sahai v. Rukko* ⁽⁵⁾, *Mari v. Ohinnam Mal* ⁽⁶⁾.

The Vedas and Manu are generally against the succession of females, and the list of heirs in the *Mitakshara* does not include the daughter-in-law. Of the views expressed by the commentators the Bombay rulings in this matter approve of those of *Balambhatta* and *Nanda Pandita*, while the Calcutta and Allahabad High Courts accept those of the *Viramitrodaya*, an earlier commentary, as of greater weight. *Lallubhai Bapubhai v. Cassibai* ⁽¹⁾, a Privy Council ruling, clearly indicates that their Lordships upheld the decision of the Bombay High Court only as an exposition of the law of inheritance prevailing in Western India, *i.e.*, in the Bombay Presidency, and mainly upon the learning and research displayed in the judgments under appeal. "Their Lordships do not find any satisfactory grounds which should induce them to dissent from the conclusion of the High Court that the doctrine which has actually prevailed in Bombay is in favour of the right of the widow; nor any sufficient reason for holding that the doctrine which has so prevailed should not have the force of law" (page 126). The authority is thus strictly confined to the Bombay Presidency.

The learned author of the *Tagore Law Lectures*, 1880, while he generally adopts a non-committal attitude is evidently not in sympathy with *Balambhatta*, mentioning the tradition that "Balam's gloss was the work of a female hand," and he points out that the *Viramitrodaya* is according to the Privy Council "properly receivable as an exposition of what may have been left doubtful by the *Mitakshara* and is declaratory of the law of the Benares School," and that commentary excludes a daughter-in-law (pages 664-65). Mayne in para. 529 of his *Hindu Law and Usage* (6th Edition) distinctly declares against the rule of succession of the widow of a son or collateral as held in Western India (page 696) in the absence of any express text in the *Mitakshara*.

(1) *I. L. R.*, V Bom., 110.

(2) *I. L. R.*, XXI Bom., 739.

(3) *I. L. R.*, IX Calc., 315.

(4) *I. L. R.*, XVI Calc., 367.

(5) *I. L. R.*, III All., 45.

(6) *I. L. R.*, VIII Mad., 107.

It is certainly significant that all the Hindu High Court Judges (Mitter, Officiating C. J., in *Anand Bibee v. Nounit Lal* ⁽¹⁾, Banerjee, J., in *Jogadamba Koor v. Secretary of State for India in Council* ⁽²⁾, and Muttusami Ayyar, J., in *Mari v. Chinnam Mal* ⁽³⁾), are opposed to the Bombay interpretation of the *Mitakshara*.

Further, in the absence of any express authority to the contrary, we are inclined to view the decisions on the *Mitakshara* Law given by the High Courts of Allahabad and Calcutta as of more direct application to this Province than the Bombay rulings.

Though the list of heirs in the *Mitakshara* may not be exhaustive, the difficulty of extending succession to females not expressly named therein is demonstrated by the conflict between the two commentators abovementioned, *Ballambhatta* and *Nanda Pandita*.

We consider the weight of authority is in favour of the view that the daughter-in-law under the *Mitakshara* Law as applicable to this Province is not an heir. Nor does she take by survivorship, not being a joint owner with her father-in-law (*Ananda Bibee v. Nounit Lal* ⁽¹⁾).

Mussammat Kirpi, defendant, thus has no right to succeed to her father-in-law Deviditta Mal either by law or custom in the presence of collaterals such as plaintiff who is related to Deviditta Mal in the 4th degree and who is entitled to a $\frac{3}{4}$ th share in Deviditta Mal's estate.

We therefore reverse the order of the Divisional Court, dismissing the plaintiff's claim, and under Section 562, Civil Procedure Code, we remand the appeal to that Court for disposal of the points therein arising and which were left undecided.

Stamp on appeal in this Court to be refunded. Other costs of this Court will be costs in the cause.

Appeal allowed.

(1) I. L. R., IX Calc., 315.

(2) I. L. R., XVI Calc., 367

(3) I. L. R., VIII Mad., 107.

Full Bench.

No. 101.

Before Mr. Justice Clark, Chief Judge, Mr. Justice Reid, and
Mr. Justice Harris.

HIRA SINGH AND OTHERS,—(PLAINTIFFS),

Versus

GURMUKH SINGH,—(DEFENDANT).

Civil Reference No. 30 of 1900.

REFERENCE SIDE. {

Jurisdiction—Jurisdiction of Civil or Revenue Court—Grant of a portion of the village common land to a person holding the office of ala lambardar rent free—Suit for dispossession—Landlord and tenant—Punjab Tenancy Act, 1887, Section 4, clause 5.

Defendant having been appointed ala lambardar by virtue of his office obtained a grant from Government with the consent of the village proprietary body of a portion of the village common land as *muafi*. The *muafi* was resumed in 1892, and plaintiffs the recorded proprietors of the land sued for possession on the allegation that they were the landlords, and that the land had been held by defendant as ala lambardar's *muafi*, and that on the resumption of the *muafi* the defendant was not entitled to retain possession. The question referred was whether the suit was one cognizable by the Civil or Revenue Court.

Held by the Full Bench that the suit was excluded from the cognizance of the Civil Court as the arrangement made with the consent of the proprietary body was a transfer to the ala lambardar of a rent free cultivating right for a fixed term, and that the ala lambardar held under the proprietary body, and was their tenant.

Sham Singh and others v. Ghula Singh and others ⁽¹⁾, and *Sohna v. Mosam* ⁽²⁾ overruled. *Jhanda Singh v. Dhona Singh* ⁽³⁾, and *Lahna Singh and others v. Hira Singh* ⁽⁴⁾ cited and approved.

Case referred by the Commissioner and Superintendent, Lahore Division, on 26th February 1900.

Shelverton and Kharak Singh for defendant.

The question of law involved was referred to a Full Bench by the following order of the Divisional Bench (Harris and Rattigan, JJ.).

11th Augt. 1900.

RATTIGAN, J.—This is a reference by the Collector of the Lahore District, and the point involved is one of some difficulty, and has given rise to conflicting judgments of this Court and of the Financial Commissioners.

At the time of Mr. Prinsep's Settlement, defendant was appointed ala lambardar, and in virtue of his office was granted

⁽¹⁾ 105, P. R., 1894.

⁽²⁾ 23, P. R., 1895.

⁽³⁾ 1, P. R., 1896, Rev.

⁽⁴⁾ 1, P. R., 1897, Rev.

by Government, acting with the consent of the village proprietary body, a plot of the village land as *muafi*. The *muafi* was resumed in 1892, and plaintiffs, who are the recorded proprietors of the said land, now sue for possession and allege, (i) that they are the landlords, and the land has been held by the defendant as *ala* *lambardar's muafi*, (ii) that on the resumption of the *muafi*, the defendant was no longer entitled to retain possession. In reply, defendant pleaded that he had had over thirty years' adverse possession, and had thereby acquired proprietary rights in the land, or alternatively, that he had acquired occupancy rights therein, and that, in any event, he was entitled to compensation for improvements effected by him. Subsequently he abandoned his plea of adverse possession.

It appears that in 1897 the proprietors issued notices of ejectment against the defendant, and it was decided, in suits to contest those notices, that as the relationship of landlord and tenant did not exist between the parties, reference should be made to the Civil Courts. Suits were thereupon instituted in the Civil Court which, however, decided, in accordance with certain rulings of the Financial Commissioner, to which allusion will hereafter be made, that the parties stood in the relationship of landlord and tenant to each other, and that consequently the suits were cognizable by a Revenue Court. Plaintiffs accordingly brought the present suit in the Court of the Assistant Collector, 1st grade, Lahore, who found that defendant had acquired occupancy rights in the land under Section 5 (i) (d) of Act XVI of 1887, and dismissed the claim. Plaintiffs appealed against this decision to the Collector. That officer finding it impossible to reconcile the ruling of the Financial Commissioner, reported as *Lahna Singh and others v. Hira Singh* ⁽¹⁾ with the decision of this Court in *Sohna v. Mosam* ⁽²⁾, has referred the question whether the suit is cognizable by Civil or a Revenue Court to this Court, under Section 99 of Act XVI of 1887.

The answer to this question seems to us to depend upon the question whether the defendant, after he was put into possession of the land as *muafidar*, was a "tenant" of the proprietors of the land within the definition as given in Section 4 (5) of the Tenancy Act, 1887. If he was, then on the resumption of the *muafi* in 1892, he would have been in the position of a tenant holding over after the determination of his tenancy, in the absence of evidence showing that the tenancy was at an end, and that he was a mere trespasser. In this case, the present suit would clearly be

⁽¹⁾ 1, P. R., 1897, Rev.⁽²⁾ 23, P. R., 1895.

one cognizable by a Revenue Court. If, on the other hand, the defendant was at no time a "tenant" of the plaintiffs, the suit would be one against a trespasser, and as such cognizable by the Civil Courts.

Upon the question whether under such circumstances the defendant can be regarded as having occupied the position of a tenant holding under plaintiffs, the Chief Court and the Financial Commissioner have differed. In *Sham Singh and others v. Ghula Singh and others* (1) this Court held that it cannot be said that under an arrangement whereby the village proprietors assign a portion of land to the endowment to the office of ala lambardar to which Government appoints a certain person, the person so appointed and in possession of the assigned land is a "tenant" of the village proprietors in the sense of holding land "under" them. In this case Roe, J., observed: "It appears to us that he cannot 'possibly be said to have ever held this land under plaintiffs, the 'village proprietors. If he held it 'under' any one, he held it 'under the Government. But he never was, and never could have 'been, liable to pay rent for the land to Government, for Government 'was in no sense the proprietor or lessee of the land, and could not 'have claimed rent from any one.'" Mr. Justice Plowden added: "The ala lambardar holds land in the village, no doubt, and it 'is the land of the proprietary body, but there is no such fixed 'connection between him and them that he can be said to hold 'under' them. The proprietary body have placed a plot of land 'at the disposal of Government for a special purpose. The Govern- 'ment appoints the officer and the officer takes possession for the 'purpose of beneficial enjoyment of the plot in his capacity of offi- 'cer. The proprietary body stands in no such relation towards 'the occupant by reason of its transaction with the Government 'and the Government appointment of the officer as gives the pro- 'prietary body a legal right either to distrust his possession or to 'recover possession from the officer under any circumstances so 'long as he holds as officer, or to abolish the office or remove an 'incumbent from his office. If the officer holds 'under' 'any one, he holds 'under' the Government, the proprietary 'right continuing in the proprietary body (subject, of course, to 'partition of the right) divorced for the time being from the 'right to possession which usually accompanies that right. But 'this proprietary right entitles them to recover possession from a 'trespasser during vacancy of the office. The 'position of the ala lambardar in regard to the land occupied

(1) 105, P. R., 1894.

“by him in virtue of his office is no doubt to some extent anomalous, but it is not a legal impossibility that a man should occupy in a village land owned by the proprietary body and yet be neither tenant nor trespasser in respect of the land in his occupation.”

This decision was cited and followed by Rivaz and Chatterji, JJ., in *Sohna v. Mosam* (1).

On the other hand, the Financial Commissioner (Mr. C. M. Rivaz) in *Jhanda Singh v. Dhana Singh* (2) expressed his dissent from the view adopted in *Sham Singh and others v. Ghula Singh and others* (3), and stated that he was clearly of opinion that under the circumstances “the position of the chief lambardar is no other than that of a tenant of the land in his occupation, inasmuch as he has been holding it temporarily by consent of the proprietors and so under them, and has been liable to pay rent for the land to the proprietors, should they make such a demand, at all events on expiry of the settlement that was current when the land was given him.” Again, in *Lahna Singh and others v. Hira Singh* (4) (at page 2) the Financial Commissioner (Mr. C. L. Tupper) remarked that “the Financial Commissioner, Mr. Rivaz, in *Jhanda Singh v. Dhana Singh* (2) differing with the Chief Court, has held that the ala lambardars in these cases are tenants holding under the proprietors. I have fully considered that view and agree in it.”

After careful consideration of the judgments above referred to, we are not satisfied that the decisions of this Court are correct. A tenant as defined in Section 4 (5) of the Tenancy Act, means “a person who holds land under another person and is, or but for a special contract would be, liable to pay rent for that land to that other person.”

It is conceded that the ala lambardar is granted possession of the land with the consent of the proprietary body, and that the latter continue to be thereafter, no less than they were before, sole proprietors of that land. By an express agreement with Government they have contracted to levy no rent from the officer for his occupation of the land, and have impliedly or possibly at times expressly consented that he shall remain in undisturbed possession of it so long as he retains his office. But they remain full proprietors, and the ala lambardar, who has obtained possession with their consent, holds the land subject to their undoubted proprietary rights which are unaffected. It is true that the proprietors do

(1) 23, P. R., 1895.

(2) 1, P. R., 1896, Rev.

(3) 105, P. R., 1894.

(4) 1, P. R., 1897, Rev.

not appoint the officer or select a person for the post, but their agreement with Government amounts to this, that they are willing to allow any person, whom Government may appoint, to occupy a portion of their land free of rent for a specified period. The person appointed obtains possession of the land under this arrangement and, *but for the agreement between the proprietors and the Government, he would be liable to pay rent for that land.* Government appoints him, but he does not hold the land "under" Government, admittedly because (in the words of Mr. Justice Roe) he never was, *and never could have been*, liable to pay rent for the "land to Government, for Government was in no sense the proprietor" *"or the lessee of the land."* But the village proprietors, on the other hand, are the proprietors of the land, and, except for a special contract made by them, any person obtaining possession of their land would, without doubt, be liable to pay rent for that land. Upon what ground, then, can it be held that the *ala lambardar* does not "hold under" the proprietors? The words underlined "hold under" mean, so at least it seems to me nothing more than this, that the possession of the holder is admittedly subject to the superior proprietary right of another in the land. Possibly, the incidents of the holder's tenure may be such that he is not liable, by reason of a special agreement, either to pay rent for, or to be ejected for a specified or definite period given from, the land, but so long as a person is in possession of another's land for a temporary purpose and with the consent of that other, whose proprietary rights are acknowledged, the possessor should, in my opinion, be regarded as holding the land "under" the proprietor. That in the decisions of this Court to which reference has been made, it has been held otherwise, is due, if I may, with the greatest respect for the learned Judges who so decided, venture to say so, to an unconscious confusion of the tenure of an *ala lambardar's* office with that official's tenure of the land granted to him. His office he holds under Government which appointed him, and with his office the proprietors of the village cannot interfere. But his land he has obtained from the proprietors, indirectly, no doubt, but still with their consent, and, though for special reasons he holds it rent free and cannot be evicted or ejected from it, he is in possession subject to the proprietary rights of the latter. His occupation of the land is in reality permissive, and I am of opinion that under such circumstances he must be considered to "hold under" the proprietors. In certain cases perhaps the consent of the proprietary body to the transaction proposed by Government was not altogether freely given, but whether free or not, such consent was in point of fact obtained and the Settlement Officer

in making an allotment of village land to the ala lambardar acted invariably in consultation with the proprietary body. For the purpose of the argument it may, therefore, be assumed that the ala lambardar was placed in possession with the express consent and permission of that body whose *dominion* continued thereafter unimpaired except to the extent expressly agreed upon by them. That a person should be in possession of land admittedly belonging to another and yet be neither a tenant nor a trespasser in respect of such land is, if not a legal impossibility, at least a unique anomaly, and it would be, I think, exceedingly difficult to define the legal *status* attaching to a person under such circumstances. I for my part can see no reason for clothing the ala lambardar in possession with a *status* at once undefined and anomalous, and I think that, under the ordinary principles of law, he should be regarded as a tenant holding the land under the proprietors to whom, but for the contract between the latter and Government, he would be liable to pay rent for that land.

I would, therefore, with the concurrence of my learned colleague, refer the following question to a Full Bench for decision :—

“Where Government, in order to endow the office of ala lambardar, has arranged with the proprietary body of the village that such officer shall take over part of the village common rent-free and retain possession thereof during the term of the settlement, and the proprietary body has given its consent to the arrangement, does that officer on taking possession of such land, thereby become the ‘tenant’ of the proprietary body within the meaning of Section 4, clause (5) of the Punjab Tenancy Act, 1887?”

HARRIS, J.—I think, for reasons stated by my learned colleague, the above question should be referred to a Full Bench, and it is referred accordingly.

13th Augt. 1900.

The following judgments were delivered by the learned Judges, who constituted the Full Bench :—

HARRIS, J.—The question referred to the Full Bench for decision is—

24th Dec., 1900.

“Where Government, in order to endow the office of ala lambardar has arranged with the proprietary body of the village that such officer shall take over part of the village common rent-free and retain possession thereof during the term of the Settlement and the proprietary body has given its consent to the arrangement, does that officer on taking possession of such land,

“thereby become the ‘tenant’ of the proprietary body within “the meaning of Section 4, clause (5) of the Punjab Tenancy Act, “1887.”

The reference was deemed necessary owing to a conflict of views expressed in *Sham Singh and others v. Ghula Singh and others* ⁽¹⁾, (also printed as *Punjab Record*, 123 of 1893) by Plowden and Roe, JJ., followed in *Sohna v. Mosam* ⁽²⁾ (Rivaz and Chatterji, JJ.), with the view taken by the Financial Commissioner (Mr. C. M. Rivaz) in *Jhanda Singh v. Dhana Singh* ⁽³⁾ and followed in *Lahna Singh and others v. Hira Singh* ⁽⁴⁾.

Under the Punjab Tenancy Act of 1887, “tenant” means a person who holds land under another person, and is, or but for a special contract would be, liable to pay rent for that land to that other person, but it does not include—

- (a) an inferior landowner, or
- (b) a mortgagee of the rights of a landowner, or
- (c) a person to whom a holding has been transferred, or an estate or holding has been let in farm, under the Punjab Land Revenue Act, 1887, for the recovery of an arrear of land revenue, or of a sum recoverable as such an arrear, or
- (d) a person who takes from the Government a lease of unoccupied land for the purpose of sub-letting it.

I think it is clear that the *ala lambardar* of the reference does not come within any of the classes (a) to (d) of the above definition.

Two things are necessary to constitute the *ala lambardar* the tenant of the proprietary body, *viz.*, (1) he must hold the land under that body, and (2) he must be liable to pay rent for the land, except in the case of a special contract that he is not to pay rent.

I do not consider that the second necessary condition presents much difficulty. Under ordinary circumstances any one taking over part of the village common would be liable to pay rent therefor to the proprietary body. Hence if there was a contract, express or implied, between the proprietary body and the *ala lambardar* that he was to hold the land rent-free the second condition is satisfied. It seems to me that the case put assumes a contract. The agreement to forego rent must be held to be

⁽¹⁾ 105, P. R., 1894.

⁽²⁾ 23, P. R., 1895.

⁽³⁾ 1, P. R., 1896, Rev.

⁽⁴⁾ 1, P. R., 1897, Rev.

between the ala lambardar and the proprietary body, and Government in getting the proprietors to allow the ala lambardar to hold rent-free are only in the position of an intermediary. It is true that Government are appointing a village officer rather than a village servant, but I do not think it can be contended that the agreement between the ala lambardar and the proprietors is without consideration.

But the decision in *Sham Singh and others v. Ghula Singh and others* ⁽¹⁾ turned upon the question whether the ala lambardar was holding "under" the proprietary body, and that is the point on which this Court and the Financial Commissioner have differed.

Mr. Justice Roe in *Sham Singh and others v. Ghula Singh and others* ⁽¹⁾ said: "Now the facts connected with Gulab Singh's occupation of the land are that the village proprietors set aside 'a portion of the village waste for an endowment of the office of ala lambardar, the appointment to the office was to rest solely with the Government . . . Gulab Singh was appointed . . . by the Government, and . . . entered into possession of the assigned land, that is of the holding now in dispute. It appears to us that he cannot possibly be said to have ever held this land under the plaintiffs, the village proprietors. If he held it 'under' any one, he held it under the Government. But he never was, and never could have been, liable to pay rent for the land to Government, for Government was in no sense the proprietor or lessee of the land, and could not have claimed rent from any one. Gulab Singh held the land, not as the 'tenant' of any one, but purely as a village officer, for whose support the land had been assigned."

Sir Meredyth Plowden said—

"The transaction presents itself to my view as having been in general, one by which the Settlement Officer procured the assent of the general body of village proprietors to the assignment of a portion of village land to a particular object, viz., the endowment of the new office of ala lambardar, the proprietary body usually though not invariably (see *Gurbuksh Singh, Kharak Singh and others v. Qutb-ud-din*) ⁽²⁾, agreeing to forego any claim to profit from such portion, and the Government agreeing to forego revenue. All that was to pass to the office-holder under the ordinary arrangement was the beneficial enjoyment and not the proprietary right, he was to hold the land by virtue of his

⁽¹⁾ 105, P. R., 1894.

⁽²⁾ 105, P. R., 1879.

“office and the power of appointment rested with the Government.
 “Now on such facts it appears to me that it cannot be accurately
 “said that an ala lambardar is a tenant of the proprietary body
 “even on the wider interpretation of ‘tenant’ contained in the
 “Punjab Tenancy Act of 1887, as compared with that of 1868.
 “The ala lambardar holds land in the village no doubt, and it
 “is the land of the proprietary body, but there is no such fixed
 “connection between him and them that he can be said
 “to hold ‘under’ them. The proprietary body have placed
 “a plot of land at the disposal of Government for a special
 “purpose. The Government appoints the officer, and the officer
 “takes possession for the purpose of beneficial enjoyment of the
 “plot in his capacity of officer. The proprietary body stands in
 “no such relation towards the occupant by reason of its transac-
 “tion with the Government, and the Government appointment of
 “the officer as gives the proprietary body a legal right either
 “to disturb his possession or recover possession from the officer
 “under any circumstances so long as he holds as officer, or
 “to abolish the office, or remove an incumbent from his office. If
 “the officer ‘holds under’ any one, he ‘holds under’ the
 “Government, the proprietary right continuing in the proprietary
 “body (subject of course to partition of the right) divorced for
 “the time being from the right to possession which usually accom-
 “panies that right. The position of the ala lambar-
 “dar in regard to the land occupied by him by virtue of his office
 “is no doubt to some extent anomalous, but it is not legal impos-
 “sibility that a man should occupy in a village land owned by the
 “proprietary body, and yet be neither tenant nor trespasser in
 “respect of the land in his occupation.”

On the other hand, the Financial Commissioner in *Jhanda Singh v. Dhana Singh* ⁽¹⁾ in differing from the above view said,
 “the Settlement Officer, wishing to provide some extra emoluments
 “for the chief lambardar, induced the village proprietary body
 “in several instances to allow him to cultivate, free of rent, a
 “piece of their common land. But there was no special agreement
 “made between the village proprietors and chief lambardar. . . .
 “that the land was given as a perpetual rent-free assignment for
 “the support of the office of chief lambardar. The arrangement
 “was one which, it seems to me, the proprietors were at liberty
 “to revoke at any time, should they insist on so doing, either by
 “taking back their land or demanding rent for it. At most the
 “arrangement could not, I think, be held to be binding on them

(1) 1, P. R., 1896, Rev.

"beyond the term of the settlement current at the time.
 "I am therefore clearly of opinion that, under the circumstances,
 "the position of the chief lambardar is no other than that of tenant
 "of the land in his occupation, inasmuch as he has been holding
 "it temporarily by consent of the proprietors and so under them,
 "and has been liable to pay rent for the land to the proprietors,
 "should they make such a demand, at all events on expiry of the
 "settlement that was current when the land was given to him."

I have excerpted at length from the above judgments to exhibit the trains of reasoning which led to divergent views. In *Sham Singh v. Ghula Singh* ⁽¹⁾ stress was laid upon the fact that the ala lambardar holds the land as a village officer appointed by Government, and the fact that he holds with the consent of the proprietary body, which was, evidently the basis of the view adopted in *Jhanda Singh v. Dhana Singh* ⁽²⁾ was, if I may venture to say so, comparatively lost sight of.

In my opinion the true decision of the above somewhat nice distinction depends upon an answer to the question whether the rights of the proprietary body are to be viewed as in abeyance (in the words of Plowden, J., "the proprietary right continuing in the proprietary body divorced for the time being from the right to possession") for the term of settlement, or whether the arrangement is to be considered a mere transfer of a rent-free cultivating right for a fixed term.

It appears to me that all the proprietary body have relinquished is the right to take rent or resume possession for the fixed term of settlement. That relinquishment alone does not exclude the ala lambardar from the definition of tenant or divest the proprietary body of all proprietary rights.

If the proprietary body themselves choose to put any person in possession of a plot of their village common rent-free for the term of settlement such person would be holding "under" them, and would be their "tenant." The only difference in the case put is that Government appoints that person, and the proprietary body agree that the person so appointed shall be put in occupation on the above terms. Under these circumstances the learned Judges in *Sham Singh and others v. Ghula Singh and others* ⁽¹⁾ appear to have found it difficult to decide that the person appointed held "under" Government.

I do not think that in such case the rights of the proprietary body can be held to be wholly in abeyance, in other words, that it

(1) 105, P. R., 1894. (2) 1, P. R., 1896, Rev.

can be contended that the proprietary body have given up entire control of the land. Is the ala lambardar entitled to deal with the land as he pleases, and in a manner inconsistent with and exceeding the legal rights of an ordinary tenant? Can he, for instance, cut down all the trees on the land, cover the land with buildings, or turn the land into a brickfield without the proprietary body being legally enabled to restrain him? I consider he cannot, his possession being temporary and permissive.

The conclusion I arrive at is that the arrangement made by consent of the proprietary body is a transfer to the ala lambardar of a rent-free cultivating right for a fixed term, that the ala lambardar "holds under" the proprietary body and is consequently their "tenant." I would therefore answer the question put in the affirmative.

2nd Jany. 1901.

CLARK, C. J.—I concur with my learned colleague in answering the question referred in the affirmative.

In my opinion all that is granted to the ala lambardar in these cases is the right of cultivation free of rent for some term. The proprietary right still remains with the proprietary body, and if the ala lambardar attempted to exercise any right other than cultivation with reference to the land granted the proprietary body would have the power to restrain him *ex gestra*, they could restrain him from alienating, from doing anything to permanently damage the land, or from building on the land.

Under these circumstances the ala lambardar must be considered to hold under the proprietary body and to be their tenant.

The fact that his tenure has been established by an arrangement between the Government and proprietary body, and that the proprietary body cannot eject him or charge him rent for some term, does not make him independent of the proprietary body, he still holds "under" them and subject to their control just as a lessee who under his lease had obtained similar term would hold under them.

3rd Jany. 1901.

REID, J.—For the reasons recorded by my learned colleagues I concur in answering the question referred to us in the affirmative.

8th Jany. 1901.

CLARK, C. J.—The question referred having been answered in the affirmative, the case is returned to the Divisional Bench.

No. 102.

Before Mr. Justice Robertson and Mr. Justice Harris.

SAYAD RAHIM SHAH AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

SAYAD HUSSAIN SHAH AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 497 of 1897.

Custom - Inheritance—Gardezi Sayads of Mooltan District—Widow's right of inheritance—Muhammadan law—Wajib-ul-arz—Application of Wajib-ul-arz to an owner who is not specifically mentioned therein.

In a suit the parties to which were Gardezi Sayads of the Mooltan District, found that the parties were governed as regards the matter in question by custom, and not by Muhammadan law, and that among them a sonless widow was entitled to succeed to her husband's estate for life.

The *Wajib-ul-arz* of a village should be presumed to apply to all land-owners in the village as a body unless they are specifically exempted.

Mussammat Ghulam Zohra v. Rukn Abdullah Shah ⁽¹⁾ followed and *Mussammat Sardar Bibi v. Sayad Ali Shah* ⁽²⁾ distinguished.

First appeal from the decree of Lala Achhru Ram, District Judge, Mooltan, dated 27th March 1897.

Duni Chand, for appellants.

K. P. Roy, for respondents.

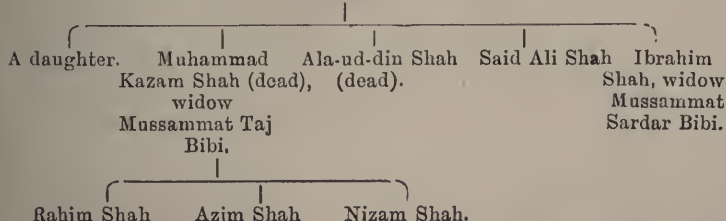
The judgment of the Court was delivered by

ROBERTSON, J.—The history of this case is somewhat peculiar. 14th June 1901.

The parties are Gardezi Sayads of the Mooltan District and the property which is affected by this suit is situated partly in the Mooltan *tahsil* and partly in the Lodhran *tahsil* of the Mooltan District.

In 1884 the father of the present defendants Said Ali Shah brought a suit against Mussammat Sardar Bibi, wife of Ibrahim Shah. The following brief pedigree-table shows the relationship between the parties in that suit.

SAYAD GHULAM RASUL SHAH.



⁽¹⁾ 18, P. R., 1889.

⁽²⁾ 4, P. R., 1888.

The suit of 1884 was brought by Said Ali Shah against the widow of his brother Ibrahim Shah, Muhammad Kazam Shah, another brother, was dead, leaving three sons, who are now plaintiffs in the present suit, and Ala-ud-din Shah, another brother of Ibrahim Shah, was also dead. Said Ali Shah claimed first that according to custom Ibrahim Shah's widow was only entitled to maintenance, and he, Said Ali Shah, to the whole property, and second that according to Muhammadan law, he plaintiff, was entitled to three-fourths of the property and the widow to one-fourth. The sons of Muhammad Kazam Shah in that case, who under strict Muhammadan law would have been excluded, as that law does not allow of representation, sided with the widow of Ibrahim Shah who claimed a life-interest in the whole property. That case was fully fought out and finally came to this Court, and the judgment then delivered is reported as *Mussammât Sardar Bibi v. Sayad Ali Shah* ⁽¹⁾. The case is therefore one of great importance in this suit, both because some of the present parties were parties to that suit which was regarding the property also now in suit, and because it is a reported precedent. The final decision come to in that case was that "notwithstanding the failure of the plaintiff to establish "that Muhammadan law is followed, Muhammadan Law must "furnish the rule for the present case, by force of the provisions of "the Punjab Laws Act because no customary rule is established."

The plaintiffs in the present suit, the sons of Muhammad Kazam Shah, were not parties to the suit of 1884 decided in *Mussammât Sardar Bibi v. Sayad Ali Shah* ⁽¹⁾, and they now sue alleging that custom is the proper rule to apply to succession in their family. That they are not bound by the decision in *Mussammât Sardar Bibi v. Sayad Ali Shah* ⁽¹⁾, and they claim one-half of the three-fourths of Ibrahim Shah's estate which Said Ali Shah got possession of after the former suit alleging that as *Mussammât Sardar Bibi* was entitled to possession for life and they have always asserted that right they can claim their share of Ibrahim Shah's estate within 12 years of the widow's death, under custom they would be entitled to sue, as succession by representation is allowed according to custom. The first Court framed six issues, but finally dismissed the suit as barred by limitation under Article 123 as not having been brought within 12 years of the death of Ibrahim Shah. On appeal to this Court, by a remand order, dated 22nd March 1900, the case was sent back for further inquiry and another issue was added

⁽¹⁾ 4, P. R., 1888.

to be first gone into and decided. "Are the parties governed by "an agricultural custom under which the widow of Ibrahim Shah "succeeded to his whole property on a life-interest, or by Muham- "madan Law?"

In the return to the remand order, dated 8th August 1900, the lower Court found that the parties are governed by agricultural custom, and that according to that custom the widow of Ibrahim Shah succeeded to his whole property on a life tenure, the claim therefore being established and within limitation. The other issues were also decided, but this is the main point in the case, and we have now to consider it.

We have noted above the decision in *Mussammat Sardar Bibi v. Sardar Ali Shah* ⁽¹⁾. In that case the property in suit was situated in the villages Jalilpur, Nisfi Miani, Tal Bagali in the Mooltan *tahsil* and Ahir or Hir in the Lodhran *tahsil*. Shortly afterwards another case in which the parties were also Gardezi Sayads came before this Court and before a Bench consisting of the same Judges who had decided *Mussammat Sardar Bibi v. Sayad Ali Shah* ⁽¹⁾. In that case the opposite conclusion was come to, and it was held that the parties were governed by custom, and that a widow does succeed for life to her husband's estate in the absence of sons.

In that case *Mussammat Sardar Bibi v. Sayad Ali Shah* ⁽¹⁾ was discussed, and the learned Judge himself pointed out that in the first case no *Wajib-ul-arz* of the first settlement was produced as it had been in the case decided in *Mussammat Ghulam Zohra v. Rukn Abdulla Shah and others* ⁽²⁾, page 56, and great stress is again laid on this point on page 59 of No. 4 of 1888 of the *Punjab Record* for 1888.

In the case before us the villages concerned are Jalilpur, Taraf Ravi, Nisfi Miani, Bangalwala in *tahsil* Mooltan and Ahir in *tahsil* Lodhran. The *Wajib-ul-arz* of the first four villages are all on the record on this case (paper book pages 61, 62, 63, 64). Whereas in *Mussammat Sardar Bibi v. Sayad Ali Shah* ⁽¹⁾ no *Wajib-ul-arz* of any village in disputes was on the record, and this case is therefore clearly distinguishable from *Mussammat Sardar Bibi v. Sayad Ali Shah* ⁽¹⁾, for precisely the same reason that *Mussammat Ghulam Zohra v. Rukn Abdulla Shah and others* ⁽²⁾, was so distinguishable, and the weight of that ruling in support of defendants' contention is reduced practically to *nil*. We are not at liberty to say that if the *Wajib-ul-arz* which have been

⁽¹⁾ 4, P. R., 1888. ⁽²⁾ 18, P. R., 1889.

produced in this case had been before the learned Judges in the case decided in *Mussammât Sardar Bibi v. Sayad Ali Shah* ⁽¹⁾, that the decision in that case would have been different, but we have the best possible authority that of the Judges themselves, for considering it an extremely important factor in this case.

We have heard counsel at an immense length for the respondents and have gone most carefully through all the instances adduced. We have not the slightest hesitation in coming to the same conclusion as was come to by the learned Judges in *Mussammât Sardar Bibi v. Sayad Ali Shah* ⁽¹⁾, without the aid of the *Wajib-ul-arz* on one point, and that is that, it has certainly not been proved that the parties are governed by Muhammadan Law. It has never been definitely stated by defendants whether they are governed by *Hunfi* or *Imamia* Law, and when defendant Sayad Hussain Shah was asked in Court by ourselves what creed he professed, his reply was *Sunni Shia*. We do not in this connection propose to examine all the instances in detail, only two appear really to be instances of Muhammadan law being followed. One is the case of *Mussammât Badshahzadi* and *Mussammât Zohran Bibi*, given at page 177 of the paper book. But even there its value is discounted by the fact that the order was passed by agreement, and the defendant claimed at least a *quid pro quo* in the shape of a share of movables and the custody of the infant daughter and her property. The other is the case given at page 179 of the paper book regarding the widow of Jindu Shah, a member of this family. In these cases the shares given are very nearly those allowed by Muhammadan *Imamia* Law, but it appears from the annual records, as shown at page 16 of the remand paper book that as a matter of fact Jindu Shah's widow was recorded alone as in possession of her husband's lands, and no attempt was made to alter this entry for some 16 years, indeed until after this suit had been filed. In this case we find also Walayat Shah's statement to the effect that the following shares were fixed according to Muhammadan law governing the *Shia* sect.

Walayat Shah	...	...	...	...	$\frac{3}{5}$ th.
Mussammât Samani...	...	...	...	...	$\frac{4}{5}$ th.

No known system of Muhammadan Law would fix such shares on anything like them, and most of the allusions to Muhammadan Law which were brought to our notice in a nearly interminable series were of equal futility. They were mere recitals by Muhammadan Sayads that they were acting under Muhammadan Law, a

(1) 4, P. R., 1888.

statement they no doubt felt it incumbent on them to make as good Moslem, whereas what was actually being done had no sort of relation to Muhammadan Law. We have no sort of hesitation therefore in finding, as was found in *Mussammāt Sardar Bibi v. Sayad Ali Shah* ⁽¹⁾, that the parties have not been proved to be governed by Muhammadan Law. But this does not dispose of the case though it somewhat clears the ground. What we have now to consider is whether or not the parties are governed by custom, and whether the widow of Ibrahim Shah was by custom entitled to hold his estate for her life.

The Gardezi Sayads are all closely connected together, and though cases occurring among near relatives of the parties may be held to have greater force, all instances among Gardezi Sayads are of importance as was recognized in both *Mussammāt Sardar Bibi v. Sayad Ali Shah* ⁽¹⁾, and *Mussammāt Ghulam Zohra v. Rukn Abdulla Shah* ⁽²⁾. In the latter judgment, Mr. Justice Plowden notes that there were many such upon the record, though as the arguments were clearly set forth in the paper book and they were somewhat conflicting, he did not consider it necessary in an already lengthy judgment to discuss them in detail, with the exception of *Mussammāt Sardar Bibi v. Sayad Ali Shah* ⁽¹⁾, the value of which he considers discounted by the omission to discuss the *Wajib-ul-arz*. A custom of the kind set up would *prima facie* be expected to be a custom general to a group and not restricted either way to a particular branch of a family.

First we will consider the entries in village administration papers. It was argued that because the entries in the *Wajib-ul-arz* of various villages do not specifically say that they apply to Sayads, therefore it should be held that they do not do so. But this is quite an incorrect view. The *Wajib-ul-arz* of a village is to be presumed to apply to landowners in that village as a body, and it should clearly be held applicable to all such owners unless they are specifically exempted. It is not specific mention we look for in a village administration paper, but specific exemption. The case of a *Wajib-ul-arz* is totally different from, and its force far greater than, a mere entry in a *Ruwaj-i-am*.

The *Wajib-ul-arz* of the villages concerned are quite clear on the point, and this was admitted by the learned pleader for the respondent; one and all contain a clause that if a proprietor dies sonless his widow succeeds to his property, and no reason has been shown us for supposing that these entries do not apply the Sayad

⁽¹⁾ 4, P. R., 1888.

⁽²⁾ 18, P. R., 1889.

proprietors in the villages in question, and they are excellent evidence of custom. As is the case in many of the instances before us, neither side has taken sufficient care to put their instances fully before the Court, and we have incomplete extracts where we should have complete files, but as far as the *Wajib-ul-arz* are concerned they tell very strongly against the defendants. As regards the *Riwaj-i-am* prepared by Mr. Roe at the first Revised Settlement, and in which matters of custom appear to have been treated instead of as heretofore in the village administration papers (*Wajib-ul-arz*). In the *Riwaj-i-am* of Mooltan the reply recorded as having been given by the Sayads is that widows receive maintenance only for life, a declaration obviously in the interests of the males making it. In Lodhian the reply was, that, if there is no male issue, the widow takes for life; maintenance is after all only a restricted life-interest, and a life-interest in a husband's estate is only a form of maintenance. By far the most common form of maintenance recognized in the province theoretically is that the widow takes a life-interest, often modified no doubt in fact by the near agnates really working the land and providing for the widow whose legal right is clearly recognized. Here we find that the male members of this family have put forward various views at different times. Sometimes clearly to suit their own interests alone. Thus we find Mahsom Ali Shah, P. W. 5, saying what appears to be borne out by the facts that "sonless" widows sometimes take maintenance in cash and sometimes take "property in life-interest. We have given land to our mother for "life."

As regards the instances we have already noticed that in the case of Mussammat Samani, widow of Jindu Shah, relied on by defendants, as a matter of fact the entry was in the widow's favour and remained so for many years. The case of Mussammat Sardar Bibi, widow of Mubarik Shah, though not perhaps entirely supporting the claim that widows take all the property of their deceased husbands for life goes a long way in that direction and certainly gives strong support to the contention that the parties are governed by custom. The case is also important because the parties to that case belong to the family of the parties in this suit.

As to one point we think the parties are clearly governed by custom, and that is as regards representation. In the only case which has occurred among the immediate relations of the family, the sons of a deceased brother were allowed to succeed to their uncles, in the presence of other uncles, and the defendants abso-

lately failed to produce a single instance to the contrary among Gardezi Sayads either among near or distant connections. The custom is testified to by several witnesses also, and we think so far custom clearly applies. As regards the succession of widows to their husband's estates we have the finding in *Mussammât Ghulam Zohra v. Rukn Abdulla Shah* ⁽¹⁾ a case of Gardezi Sayads which is very much in point. The attempt of the learned pleader for the respondents to restrict the inquiry to the consideration of cases within an arbitrary limit which he calls the family was of course absurd. Mr. Justice Plowden considered *Mussammât Sardâr Bibi v. Sayad Ali Shah* ⁽²⁾ to be an important instance in connection with *Mussammât Ghulam Zohra v. Rukn Abdulla Shah and others* ⁽¹⁾, and if *Mussammât Ghulam Zohra v. Rukn Abdulla Shah and others* ⁽¹⁾ does not absolutely govern this case, it is of very great weight in connection with it.

It must be remembered that in these cases it is the rights of women which have been under discussion, and the record before us shows that the male relations in many cases at least have been clearly more concerned for their own advantage than for the security of the rights of widows and other female relatives with rights or alleged rights over family property, and the statements of the male relatives in such matters have to be taken *cum grano salis* where they tend to minimise the rights of others and to extend their own. To sum up a case in every respect very similar to this have been very fully discussed in a lengthy judgment in *Mussammât Ghulam Zohra v. Rukn Abdulla Shah and others* ⁽¹⁾, with the views laid down in that case we find ourselves fully in accord. We think that clearly the defendants have failed to prove affirmatively that they are governed by Muhammadan Law; we think it clearly shown that they are at least in some respects governed in the matter of succession by custom, we think that they are to be considered agriculturists, and that there has been sufficient evidence produced to show that they are in certain respects governed by custom, and thus to raise a presumption that custom and not law governs successions to property among them. We have the important judgment of *Mussammât Ghulam Zohra v. Rukn Abdulla Shah and others* ⁽¹⁾, in which it was held that the parties Gardezi Sayads of the Mooltan District as in this case were governed by custom, and that in that case a sonless widow was held to take her husband's estate for life. We have certain instances spoken to by witnesses of a widow's life interest and others of a widow receiving maintenance and to be gathered from docu-

⁽¹⁾ 18, P. R., 1889.⁽²⁾ 4, P. R., 1888.

ments, and lastly we have the clear and conclusive entries as to custom in the *Wajih-ul-arz*, presumably correct under Section 44 of the Land Revenue Act, and which have not been shown to our satisfaction to be wrong.

On a very careful consideration therefore of the whole case we hold that the parties to this case are governed by custom and not by Muhammadan Law, and that among them a sonless widow is entitled to succeed to her husband's estate for life.

As regards the question of estoppel we agree with the finding of the lower Court in the return to the remand. It appears that after the suit of 1884-1888 the defendants purchased the one-fourth share decreed to Mussammat Sardar Bibi, and again sold it to the plaintiffs. They are not suing for any part of that share, and that transaction does not debar them from contesting the question as regards the other three-fourths.

As regards the movable property for which defendants obtained a decree in 1888 there is nothing to show that defendants obtained possession of the movable property now claimed. The suit so far therefore as movables is concerned is dismissed.

As to the expenditure by defendants on improvements, they have given no proof and they have enjoyed the proceeds of the land in question for twelve years. As to the costs of the previous suit the plaintiffs are clearly not called upon to reimburse the defendants, as the suit was not only in no way for their benefit, but was brought against their wishes.

It follows from the findings we have already come to that plaintiffs must be held to be co-heirs of Ibrahim Shah jointly with defendants.

The defendants will pay plaintiffs' costs throughout, calculated on the amount of the decree obtained by them.

Appeal allowed.

Full Bench.

No. 103.

Before Mr. Justice Clark, Chief Judge, Mr. Justice Reid
and Mr. Justice Maude.

ATAR SINGH,—(PLAINTIFF),—APPELLANT,

Versus

RALLA RAM,—(DEFENDANT),—RESPONDENT.

}
APPELLATE SIDE.
}

Civil Appeal No. 1001 of 1898.

*Mortgage by conditional sale—Foreclosure—Pre-emption, suit for—
Time from which period begins to run—Limitation Act, 1877, 2nd Schedule,
Articles 10, 120.*

Held, by the Full Bench, that right of pre-emption accrues and limitation begins to run against a pre-emptor in the case of foreclosure of a mortgage by conditional sale from the date of the expiration of the year of grace allowed to the mortgagor under Regulation XVII of 1806.

Sher Singh v. Imamulla ⁽¹⁾ dissented from. Harnam Das v. Kanwar Singh ⁽²⁾, Bur Singh v. Sohel Singh ⁽³⁾, Ali Abbas v. Kalka Prasad ⁽⁴⁾, and Batul Begam v. Mansur Ali Khan ⁽⁵⁾ approved. Alu Prasad v. Sukhan ⁽⁶⁾ distinguished. Jeora Khan Singh v. Hookum Singh ⁽⁷⁾, Forbes v. Ameeroonissa ⁽⁸⁾, Ali Gauhar v. Jowahir ⁽⁹⁾, and Kunda v. Chuni Lal ⁽¹⁰⁾ referred to.

Further appeal from the decree of A. Kensington, Esquire, Divisional Judge, Jullundar Division, dated 17th May 1898.

Lal Chand and Shelverton, for appellant.

Madan Gopal, for respondent.

The point of law involved was referred to a Full Bench by the following order of the Divisional Bench (Chatterji and Maude, JJ.).

MAUDE, J.—One question arising in this appeal is whether in the case of foreclosure of a mortgage by conditional sale, the period of limitation for a suit for pre-emption should be computed from the date on which the mortgagee has completed his title by obtaining a decree of a Civil Court declaratory of his absolute right, or from the expiry of the year of grace allowed to the mortgagor. In the case of *Sher Singh v. Imamulla and Hem Singh* ⁽¹⁾, it was decided by a Division Bench of this Court that the computation must be made from the former date, and not from the expiry of the year of grace, but although that decision has not

8th Feby. 1901.

⁽¹⁾ 82, P. R., 1880.

⁽²⁾ 103, P. R., 1893.

⁽³⁾ 121, P. R., 1894.

⁽⁴⁾ I. L. R., XIV All., 405.

⁽⁵⁾ I. L. R., XX All., 315 (F. B.)

⁽⁶⁾ I. L. R., III All., 610.

⁽⁷⁾ 4, H. C. R., N.W. P., 358.

⁽⁸⁾ 5, W. R., 47 P. C.

⁽⁹⁾ 30, P. R., 1892.

⁽¹⁰⁾ 87, P. R., 1893.

been directly overruled, it would appear from the remarks made in a later case, *Bur Singh v. Sohel Singh* ⁽¹⁾, that the learned Judges were of a different opinion. So far as the North-West Provinces are concerned, a Full Bench of five Judges of the Allahabad High Court has ruled that the plaintiff's right of pre-emption accrues and limitation begins to run against him from the expiration of the year of grace, *Ali Abbas v. Kalka Prasad* ⁽²⁾. We think that the question is of sufficient importance to be referred to a Full Bench of this Court, and we refer it accordingly.

The judgments delivered by the learned Judges, who constituted the Full Bench, were as follows:—

29th June 1901.

MAUDE, J. (CLARK, C. J., concurring).—The question before the Full Bench is sufficiently stated in the order of reference. The decision of this Court in *Sher Singh v. Imamulla and Hem Singh* ⁽³⁾ was based upon a consideration of the ruling of their Lordships of the Privy Council in *A. J. Forbes v. Amceroonissa Begum*, ⁽⁴⁾ which at first sight may appear to lay down the legal necessity for a mortgagee or conditional vendee to bring a regular suit to obtain possession if he is out of possession, or to obtain a declaration of his absolute title if he is in possession. The extract from their Lordships' judgment cited in the decision of this Court, taken by itself, seems to imply that proceedings to foreclose a conditional sale under the Regulation of 1806, must necessarily be followed by a regular Civil suit if the conditional vendee is to obtain the proprietary right in the property, but a more extended examination of the judgment of the Privy Council suggests a different interpretation. Reviewing the history of the law of foreclosure and the practice of the Courts in Bengal, their Lordships observe that up to the year 1806, the rights of the holder of a *Bye-bil-wuffa* were enforceable according to the strict terms of the contract, and that Regulation XVII of 1806 introduced a modification of the strict rights given by the contract somewhat analogous to that which English Courts of Equity had long imposed on mortgages. The procedure which should be observed under the Regulation is then explained, account being also taken of the provisions of Regulation I of 1798. Then follows the passage cited in the judgment of this Court already referred to " the right of redemption is gone at the expiration of the year of grace. The title of the mortgagee, however, is not even then complete. It was ruled by the " Circular Order of the 22nd July 1813, No. 37, and has ever

⁽¹⁾ 121 P. R., 1894.

⁽²⁾ I. L. R., XIV All., 405.

⁽³⁾ 82, P. R., of 1880.

⁽⁴⁾ 5, W. R., 47, P. C.

"since been settled law, that the functions of the Judge under Regulation XVII of 1806, Section 8, are purely ministerial, and that a mortgagee, after having done all that this Regulation requires to be done, in order to foreclose the mortgage and make the conditional sale absolute, must bring a regular suit to recover possession if he is out of possession or to obtain a declaration of his absolute title if he is in possession." A reference to the Circular order alluded to by their Lordships shows that the Sudder Court at Calcutta had found it necessary to disabuse the Bengal Zillah and City Judges of an idea which had taken root that the Regulation of 1806 conferred upon them the power of summarily putting a vendee into possession of lands conditionally sold; and the Sudder Court laid down that the Regulation did not vest the Judge with authority to dispossess the seller and give up the lands to the purchaser. The judgment of the Privy Council affirms that view, stating that the functions of a Judge under the Regulation are purely ministerial, and adds, what I understand as meaning that if a mortgagee, after having complied with the requirements of the Regulation, wishes to obtain possession, he must bring a regular suit, and similarly if, while in possession, he wishes to acquire a formal declaration of title, he can only do so through the medium of the regular tribunals. This is the interpretation which the Allahabad High Court has put upon the decision of the Privy Council,—*Jiorakhun Singh v. Hookum Singh* ⁽¹⁾—, and it appears to me to be the only interpretation which will harmonize with the concluding words of Section 8 of the Regulation that if certain conditions are not fulfilled, "the mortgage will be finally foreclosed and the conditional sale will become conclusive." The Full Bench decision of the Allahabad High Court in *Ali Abbas v. Kalka Prasad* ⁽²⁾ endorses the earlier opinion of that Court in the case just cited.

In support of the opposite view, namely, that the mortgagee or conditional vendee can acquire no absolute title until he has succeeded in a regular suit, the learned pleader for the appellant relied on a decision of a Full Bench of the Allahabad High Court in *Alu Prasad v. Sukhan* ⁽³⁾, but that case does not help him, because there the mortgagee was out of possession and had to bring a regular suit to obtain it, and with reference to the terms of the administration paper of the village, it was held that the plaintiff's cause of action accrued, when in execution of his

⁽¹⁾ H. C. R., N.-W. P., Vols. IV and V, p. 358. ⁽²⁾ I. L. R., XIV All., 405.

⁽³⁾ I. L. R., III All., 610.

decree, the mortgagee obtained possession of the land. Other rulings were cited on behalf of the appellant, but they do not further his contention.

My view then is that the proprietary title of the mortgagee or conditional vendee is called into existence at the moment when the right of redemption is extinguished, and that extinction occurs as soon as foreclosure has been effected in accordance with the requirements of the Regulation, and it is immaterial whether a regular suit is instituted subsequently either by the vendor or by the vendee, for I fully agree with the opinion expressed by the learned Judges of this Court in *Bur Singh v. Sokel Singh* ⁽¹⁾, that if the vendee is successful in the suit, there is no reason why his right as absolute owner should not be referred to the date which was notified to the mortgagor as that on which the conditional sale would become conclusive in default of payment of the sum due. The decree of a Court in no way creates the title of owner as vesting in the mortgagee, the title is created by the proceedings under the Regulation, though the mortgagee may consider that a decree of Court is necessary as a formal vindication of it.

I would, therefore, answer the reference to the Full Bench by saying that the plaintiff's right of pre-emption accrues, and limitation begins to run against him, in the case in question, from the date of the expiration of the year of grace allowed to the mortgagor under Regulation XVII of 1806.

6th July 1901.

REID, J.—I concur in the answer proposed by my brother Maude. In *Harnam Das v. Kanwar Singh* ⁽²⁾, which is opposed to *Sher Singh v. Imamulla and Hem Singh* ⁽³⁾, judgment was delivered by Rivaz, J., who was a party to *Ali Gauhar and others v. Jowahir and Hira Nand* ⁽⁴⁾, and *Kunda v. Chuni Lal and others* ⁽⁵⁾ relied on in support of *Sher Singh v. Imamulla and Hem Singh* ⁽³⁾, while Stogdon, J., who was a party to *Ali Gauhar v. Jowahir* ⁽⁴⁾ relied on for the same purpose, delivered judgment in *Bur Singh v. Sokel Singh* ⁽¹⁾.

Sher Singh v. Imamulla ⁽³⁾ has therefore been subsequently dissented from by Judges who appear at one time to have approved it, and the ruling in *Ali Abbas v. Kalka Prasad* ⁽⁶⁾ cited above, has been approved and followed in *Batul Begam v. Mansur Ali Khan* ⁽⁷⁾. The case in *Ali Prasad v. Sukhan* ⁽⁸⁾ is, as pointed out, clearly distinguishable.

⁽¹⁾ 121 P. R., 1894.

⁽²⁾ 103, P. R., 1893.

⁽³⁾ 82, P. R., 1880.

⁽⁴⁾ 30, P. R., 1892.

⁽⁵⁾ 87, P. R., 1893.

⁽⁶⁾ I. L. R., XIV All., 405.

⁽⁷⁾ I. L. R., XX All., 315.

⁽⁸⁾ I. L. R., III All., 610.

No. 104.

Before Mr. Justice Robertson and Mr. Justice Harris.

BURA AND ANOTHER,—(DEFENDANTS),—APPELLANTS,

Versus

MAILIA SHAH,—(PLAINIFF),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 318 of 1899.

Interest—Absence of express agreement to pay interest—Implied agreement—Suit for balance due at dissolution of partnership and the adjustment of partnership account—Acts XXXII of 1839 and XXVIII of 1855.

In a case for the recovery of the amount due on account of balance struck by the defendants, where no express or implied agreement to pay interest was proved and in the absence of evidence that by usage interest was chargeable and where the requirements of Act XXXII of 1839 had not been satisfied, *held*, that interest should not be awarded as damages.

Kulmalammal v. Peeru Meera Lervai Routhen ⁽¹⁾ cited. *Shoo Chand v. Chunna* ⁽²⁾ and *Rukun Din v. Rikhi Kesh* ⁽³⁾ distinguished.

Further appeal from the decree of Rai Bahadur Buta Mal, Divisional Judge, Stalkot Division, dated 7th December 1898.

Dhanraj Shah, for appellants.

Ishwar Das, for respondent.

The judgment of the Court was delivered by

HARRIS, J.—We have heard counsel for appellants at length, 3rd July 1901, but we can find no cogent reason for differing from the concurrent findings of fact that both of the defendants struck the balance after the accounts had been gone into, and that the balance closed the account of a business which parties seem to have admitted was a partnership. Nor do we find any sufficient evidence in support of the alleged items of Rs. 1,175 and Rs. 1,700 pleaded by the defendants. The commissioner appointed to examine the accounts distrusted defendants' books for what appears a good reason, and no other evidence in support of the above mentioned sums has been brought to our notice. Counsel for appellants laid great stress upon the absence of transliterated accounts in the record. But what accounts were produced by parties were examined by the commissioner, and reported upon, and the commissioner was examined in Court. Our attention has been drawn to an order of the 11th May 1898, on the record of the Divisional Court, but that document is not signed by the Divisional Judge, and, even if such an order was given and not

(1) *I. L. R.*, XX *Mad.*, 481.

(2) 73, *P. R.*, 1892.

(3) 36, *P. R.*, 1894.

carried out, the defendants do not appear to have been prejudiced. It is not ordinarily for the Court, but for the parties, to adduce evidence, and it is here disclosed that if there has been any failure to produce evidence the fault lies with defendants.

The appeal as to the principal sum fails, but we consider the plea that interest is not recoverable has not been correctly dealt with by the Courts below.

In the balance itself there is no agreement to pay interest. According to the commissioner interest was charged prior to the balance of *Sambat* 1948, and thereafter up to the balance of *Sambat* 1951, which is the balance sued upon, the plaintiff appears to have taken profits in lieu of interest. Plaintiff alleged an agreement to pay interest at Re. 1 per cent. per mensem on the balance after default in payment of the balance one month subsequent to the date of striking the balance. We do not think that such an agreement has been proved, nor has any implied agreement to pay interest been established. Were the debt an ordinary book debt on current account the interest charged in previous balances would, as held by the Divisional Judge, form ground for finding in favour of an implied agreement to pay interest, and in such case we should probably be prepared to allow interest in accordance with universal usage in cases of book accounts.

In this case, however, the debt is of a peculiar nature. It has been found to be the amount due at the dissolution of partnership and the adjustment of the partnership account, and not a current account with debit and credit items subsequent to that adjustment. The amount was recoverable at any time, and though there is evidence to show demand, there was no written demand or notice to the defendants that interest would be charged.

There is no evidence that by usage interest would be chargeable on such an item, the statement of the commissioner rather leading to the supposition that in his opinion interest was not chargeable, while he left it to the Court's discretion to charge interest at a rate prevailing in money-lending transactions.

In *Sheo Chand v. Chhanna* ⁽¹⁾ and *Rukun Din v. Rikhi Kesh* ⁽²⁾ cited by the first Court there were previous agreements to pay interest, and those rulings are not applicable.

The present case is much on-all-fours with that reported in *Kalmalammal v. Peeru Meera Levvai Routhen* ⁽³⁾, in which it was held that in the absence of agreement or usage giving a right to

⁽¹⁾ 73, P. R., 1892.

⁽²⁾ 36, P. R., 1894.

⁽³⁾ I. L. R., XX Mad., 481.

interest, and of a written demand giving notice that interest would be claimed, such as is contemplated in the Interest Act, XXXII of 1839, the plaintiff was not entitled to interest. The distinction between that Act and the later Act, XXVIII of 1855, is disclosed in *Rukun Din v. Rikhi Kesh* ⁽¹⁾. It is urged by respondent's counsel that interest is payable as damages, but "in the case of actions for debt in which the requirements of the Act (XXXII of 1839) cannot be satisfied, interest cannot be awarded as damages" (Cunningham and Shephard's Contract Act, 8th Edition, at page 223). Here the requirements of the Act have not been satisfied, and no usage or contract is proved to take the case out of the operation of the Act. We hold, therefore, that no interest was legally recoverable, and so far we accept the appeal, and vary the decree to one for the principal sum, viz., Rs. 2,724-4-0. The proportionate costs on that amount in the first Court will be paid by defendants to plaintiff. Costs on Rs. 490, the amount of interest decreed by the Courts below, will be paid in this Court and in the Divisional Court by plaintiff to defendants.

No. 105.

Before Mr. Justice Robertson and Mr. Justice Harris.

RAMZAN ALI,—(DEFENDANT),—APPELLANT,

Versus

BASHARAT ALI AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 1091 of 1898.

Limitation Act, 1877, Section 28—Suit for recovery of possession of common waste land encroached upon by a trespasser—Limitation—Adverse possession—Burden of proof—Suit by some of the several co-sharers against the trespasser affecting common land—Effect of non-joinder of other co-sharers—Civil Procedure Code, 1882, Section 30—Decree, form of.

In suits for the recovery of possession of immovable property when resisted by a plea of adverse possession, the plaintiff is bound to prove possession and dispossession within twelve years, but where the property in dispute up to a short time before suit remained waste and unoccupied, held that the plaintiffs were not required to prove acts of possession within twelve years of suit, they had only to prove a *prima facie* title not extinguished by limitation in such a case. Waste land allowed to remain so by the proprietor cannot be held to be a discontinuance of possession, and the *onus* is in such a case shifted on to defendant to prove when his possession became adverse.

⁽¹⁾ 36, P. R., 1894.

Held also, that one or several of many co-sharers can sue to prevent invasion of their common property by a mere trespasser and that in such a case a decree for sole possession, or for possession on behalf of other co-sharers should not generally be given, the proper form of decree should be for the restoration of the property to its condition prior to the trespasser's invasion and so preserve the invaded rights which the plaintiff and other co-sharers possessed in the property.

Tanudin v. Pandu ⁽¹⁾, *Inayat Husen v. Ali Husen* ⁽²⁾, *Muhammad Ali Khan v. Khaja Abdul Gunny* ⁽³⁾, *Muhammad Yar v. Ghulam* ⁽⁴⁾, *Hira Lal v. Bhairon* ⁽⁵⁾, and *Hidayat Ali Khan v. Basit Ali Khan* ⁽⁶⁾ cited. *Mohima Chunder Mozoomdar v. Mohesh Chunder Neogi* ⁽⁷⁾, *The Secretary of State for India in Council v. Vira Rayan* ⁽⁸⁾, and *Jafar Husain v. Mashuq Ali* ⁽⁹⁾ referred to.

Further appeal from the decree of S. Clifford, Esquire, Divisional Judge, Delhi Division, dated 25th July 1898.

Muhammad Shah Din and Muhammad Shafi, for appellant.
Sohan Lal, for respondents.

The facts of this case sufficiently appear from the judgment of the Chief Court, delivered by

6th July 1901.

HARRIS, J.—The material facts will be found stated in the judgments of the Courts below.

The dispute concerns a site, shown as No. 4 and No. 4 A in the plan prepared during trial, which is part of an area known as Kila Sheikhan in the town of Rohtak. The site was a few months before suit enclosed by Sayad Ramzan Ali, who is the real defendant in the case, and made over by him to some *Dhanaks* and some buildings have been erected thereon. Plaintiffs are descendants of Sheikh Kawam Din and the other descendants of that Sheikh not joining in the claim have been impleaded as *pro forma* defendants, and the claim proceeds upon the allegation that the descendants of Sheikh Kawam Din are proprietors of the site. Ramzan Ali who is *mutwalli* of the neighbouring Khankah Walayat Shah alleges he is proprietor of the site.

The trial proceeded mainly upon a consideration of the documentary evidence, the oral evidence on both sides being found untrustworthy.

The first Court found that plaintiffs had not been able to prove that the site had been owned and occupied by them, and that defendant, Ramzan Ali, had proved his title, and dismissed the claim.

⁽¹⁾ *I. L. R.*, XVIII Bom., 699.

⁽²⁾ *I. L. R.*, XX All., 182.

⁽³⁾ *I. L. R.*, IX Calc., 744.

⁽⁴⁾ 49, *L. R.*, 1884.

⁽⁵⁾ *I. L. R.*, V All., 602.

⁽⁶⁾ 54, *P. R.*, 1892.

⁽⁷⁾ *I. L. R.*, XVI Calc., 473.

⁽⁸⁾ *I. L. R.*, IX Mad., 175.

⁽⁹⁾ *I. L. R.*, XIV All., 193.

On appeal the Divisional Judge found that Ramzan Ali had proved no title and that consequently "the defence fails, and upon the materials before the Court I think that the plaintiffs are entitled to a finding that the land belongs to the Sheikhs, in other words to the plaintiffs." The appeal was accepted and a decree given for the plots marked No. 4 and No. 4 A "to plaintiffs for and on behalf of the Sheikhs for whom they sue," three months being given for removal of materials by the defendants concerned.

In further appeal it is contended for Ramzan Ali (1) that part of plot No. 4 A decreed, including a privy, was admittedly not in claim; (2) that plaintiffs received no permission to sue on behalf of all the Sheikhs under Section 30, Civil Procedure Code, and so the decree is bad in law, and the claim should be dismissed; (3) that several co-sharers cannot sue to oust a trespasser who is not one of the co-sharers; (4) that the claim should be dismissed on the ground that plaintiffs have shown no possession within the twelve years preceding suit; (5) that Ramzan Ali has established his title, while the plaintiffs have not; (6) that at least the success of plaintiffs' claim should not have been made to depend upon the alleged weakness of Ramzan Ali's title; (7) that in any case the decree for possession of the whole area was wrong.

The first contention is trivial and may be disposed of by remarking that the plots Nos. 4 and 4 A in the decree of the Divisional Court refer not to the plan filed with the plaint but to the corrected plan made during the trial, a rough *facsimile* of which is given as an appendix to the judgment of that Court.

As regards the second contention we consider Section 30, Civil Procedure Code, has no application to the suit as framed. Plaintiffs have throughout been suing on the allegation that the site in dispute is the property of the descendants of Sheikh Kawam Din, and the record shows that all those descendants were impleaded either as plaintiffs or defendants. Plaintiffs were not suing on behalf of all the Rohtak Sheikhs. The cause was at one stage remanded for the purpose of having all the proprietors joined, and on that remand only the descendants of Sheikh Kawam Din were impleaded. The claim is one to restrain defendant, Ramzan Ali, from violating a common interest which it is alleged the descendants of Sheikh Kawam Din have in the land, and Section 30 is inapplicable (*Tanudin v. Panda* ⁽¹⁾), and the Court

(¹) *I. L. R.*, XVIII Bom., 699.

had to deal with the matter in controversy so far as regards the rights and interests of the parties actually before it (Section 31, Civil Procedure Code). The questions whether the descendants of Sheikh Kawam Din are, if proprietors in the site, the sole proprietors, and what form the decree, if any, should take, we propose to discuss later on.

We think there is no force in the third contention, for if that contention were correct we should arrive at the ridiculous conclusion that there is no civil remedy for an act of trespass committed in collusion with one co-sharer.

✓ Assuming that plaintiffs are some of the co-sharers in the site, we think that under the circumstances disclosed it was not, as urged in the fourth contention, for the plaintiffs to prove acts of possession within twelve years of suit. For the site has, up to a short time before suit, remained waste and unoccupied, and on the above assumption plaintiffs had only to prove a *prima facie* title not extinguished by limitation (*Inayat Hussain v. Ali Hussain* ⁽¹⁾). Possession is not the same thing as user, and as the land was waste it may be presumed that possession continued (*Muhammad Ali Khan v. Khaja Abdul Gunny* ⁽²⁾). Waste land allowed to remain so by the proprietors is no discontinuance of possession, and the *onus* is shifted on to defendant, assuming he has no other title to prove when his possession became adverse (*Muhammad Yar v. Ghulam* ⁽³⁾). ✓

The rulings cited for appellant on this point (*Mohima Chunder Mozoomdar v. Mohesh Chunder Neogi* ⁽⁴⁾), *The Secretary of State for India in Council v. Vira Rayan* ⁽⁵⁾, and *Jafar Hussain v. Mashug Ali* ⁽⁶⁾) are not on-all-fours with the present case.

As to the fifth contention we are of opinion that Ramzan Ali has not proved any title to the site in dispute. The ancestors of Ramzan Ali appear to have been given a small grant in A. H. 1111, an Alangiri *sanad* regarding which has been produced. That grant clearly does not refer to the disputed site. Further the later documents of A. H. 1139 and A. H. 1265 whatever their force, do not indicate to us the site in suit. The boundaries therein given appear to us almost conclusive on that point. The 4,200 square yards therein mentioned form, we think with the Divisional Judge, an area to the immediate south of the *khankah*, and north of the land in suit, and Ramzan Ali's recent

(1) I. L. R., XX Ad., 182.

(2) I. L. R., IX Cal., 744.

(3) 49, P. R., 1884.

(4) I. L. R., XVI Cal., 473.

(5) I. L. R., IX Mad., 175.

(6) I. L. R., XIV All., 193.

action bears the appearance of an encroachment on adjoining waste.

We agree with the Divisional Judge in his view as to the name of Ramzan Ali's father appearing in the petition of 1871. The claim made by Ramzan Ali in the case of land taken up in 1894, under the Land Acquisition Act, clearly refers to land other than that here in suit. The oral evidence for Ramzan Ali was discredited even by the first Court.

As regards the title of the plaintiffs we have come to the conclusion after a consideration of the evidence that though plaintiffs have been unable to prove that the descendants of Sheikh Kawam Din are sole proprietors of the site, those descendants are co-sharers in that site.

The Settlement Report (page 25) states that in the time of Shahab-ud-din the Sheikhs came from Yaman and built the fort which they occupy. We have referred to the Settlement Record of 1879, and find it stated therein that Sheikh Muhammad Surkh came from Yaman twenty-two generations back and got a *sanad* of some land from Shahab-ud-din, which *sanad* was not in existence, and took possession, and thereafter Sheikh Kawam Din came as the sister's son of Sheikh Muhammad Surkh and became a proprietor in the *kasba*, since which time the descendants of both Sheikh Muhammad Surkh and Sheikh Kawam Din have been in possession of the *kasba*. We have also referred to the pedigree-tables drawn up at that settlement, the copy in the file being incomplete, and therein we find that Sheikh Muhammad Surkh had a son of whose lineal descendants at least two, *viz.*, Fateh-ud-din and Imam-ud-din were alive at settlement. The sons of those two descendants were on the remand above-mentioned examined by the local commissioner appointed to discover all Shiekhs who wished to be impleaded, and those sons denied the right of the descendants of Sheikh Kawam Din and asserted their own, an assertion which was repeated by two of them, Burhan-ud-din and Majid-ud-din, in the course of the trial. It would appear from the Settlement Record that there are Sheikhs of other families who reside in Rohitak and are proprietors in the *mauza* besides the families of Sheikh Muhammad Surkh and Sheikh Kawam Din. It is somewhat significant that Hafiz Anwar Ali, apparently a leading descendant of Sheikh Kawam Din, who was at first a plaintiff, subsequently refused to join in the claim, and was impleaded as a defendant. That there are Sheikhs of other branches in the *kila* was admitted in a statement of Mubarik Ali, one of the plaintiffs, and that statement may even be taken to imply

that those other branches are also proprietors in the site of the *kila*. We are unaware of any evidence on the record to show any previous claim put forward by the descendants of Sheikh Kawam Din to be sole proprietors of the *kila* site. It has indeed been stated that, that site was recorded as *shumilat deh* at settlement, but a reference to the record-of-rights discloses no such entry. As might be expected there is no entry as to the *abadi deh*. While not doubting that the Sheikhs are owners of the vacant sites in the *kila*, we consider plaintiffs have not proved Sheikh Kawam Din's descendants to be sole proprietors. Indeed the Divisional Judge does not appear to find so, though his finding is expressed in general terms.

We have finally to decide whether upon the above findings plaintiffs are entitled to any, and, if so, what decree.

On those findings it is evident that all parties interested have not been joined, but we consider the non-joinder (*i.e.*, of other Sheikhs) is not a fatal defect. It is true that the non-joinder has been objected to throughout and so has to be considered here in further appeal. We hold, however, as expressed above in our remarks upon the third contention, that one or several of many co-sharers can sue to prevent invasion of the common property by a mere trespasser, and in the reported cases (see *Hira Lal v. Bhairon* ⁽¹⁾, *Tanudin v. Pandu* ⁽²⁾, and *Hidayat Ali Khan v. Basit Ali Khan* ⁽³⁾), it has not been deemed necessary to join all the co-sharers in the action, and we can draw no distinction where the invader is not one of the co-sharers. As the learned Judges in the Allahabad case remarked "we discern no necessity either of principle or of convenience for the joinder of the "other co-sharers in such a suit," *i.e.*, in the present suit so far as the removal of the buildings and vacation of the site are concerned. But the plaintiffs are on our findings not entitled to a decree either for sole possession, or for possession on behalf of the Sheikhs generally.

They are only entitled to have the land restored to its condition before Ramzan Ali put in the *Dhanaks* who built houses on it, and so preserve the invaded rights which they in common with other Sheikhs possess in the land.

We accordingly alter the decree to one for vacation of the site and removal of the buildings thereon against Ramzan Ali and the *Dhanak*, defendants, within three months of this date, if

(1) *I. L. R.*, V All., 602.

(2) *I. L. R.*, XVIII Bom., 699.

(3) 54, *P. R.*, 1892.

the corresponding portion of the decree of the Divisional Court has not already been carried out.

We order, under the circumstances of the case, parties to bear their own costs throughout the litigation.

No. 106.

Before Mr. Justice Robertson and Mr. Justice Harris.

SAMMAN AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

ALA BAKHSH AND ANOTHER,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 1569 of 1898.

Custom—Inheritance—Right of married daughters—Khanadamad—Exclusion of brother and nephews—Muhammadan Bangial Jats of Kharian tahsil, Gujrat District.

Among Bangial Jats of Kharian *tahsil*, Gujrat District, by custom a married daughter is entitled to succeed her father, a sonless proprietor, who settled her and her husband in his house in order that they might perform services for him and manage his cultivation, intending to pass his estate to her and her sons to the exclusion of his brothers and nephews, even though the daughter's husband had been a resident son-in-law in his first wife's family, where the first father-in-law died before the second marriage.

Shah Muhammad v. Mussammat Imam Bibi ⁽¹⁾, *Karim Bakhsh v. Haku* ⁽²⁾, *Mehr Din v. Mussammat Niki* ⁽³⁾, *Muhammada v. Mussammat Gaurian* ⁽⁴⁾, *Nathu v. Mussammat Karam Bhari* ⁽⁵⁾, *Jowaya v. Mussammat Fazlan* ⁽⁶⁾, and *Mussammat Baggi v. Mamun* ⁽⁷⁾ cited.

Further appeal from the decree of Rai Bahadur Buta Mal, Additional Divisional Judge, Jhelum Division, dated 5th August 1898.

Harris, for appellants.

Shelverton, for respondents.

The judgment of the Court was delivered by

HARRIS, J.—Parties are Muhammadan Jats, *gôt* Bangial, of 12th July 1901. *tahsil* Kharian, District Gujrat.

The lower Courts have concurred in dismissing the claim of plaintiffs, who are the brother and nephews of one Mohkam Din, deceased, for the estate of Mohkam Din, on the ground that defendants Ala Bakhsh and Mussammat Muhammad Bibi are the

⁽¹⁾ 56, P. R., 1878.

⁽²⁾ 24, P. R., 1879.

⁽³⁾ 67, P. R., 1882.

⁽⁴⁾ 162, P. R., 1882.

⁽⁵⁾ 15, P. R., 1884.

⁽⁶⁾ 45, P. R., 1885.

⁽⁷⁾ 31, P. R., 1895.

resident son-in-law and daughter of Mohkam Din and by custom entitled to succeed. A further appeal has been admitted to a hearing on the question of custom.

Mohkam Din had three daughters, all of whom are married and have sons, Mussammat Muhammad Bibi, the youngest daughter, first married Shamas Din, a nephew of Mohkam Din, and there is some reason to suppose that she was divorced by Shamas Din owing to an effort made to get Shamas Din to reside with his father-in-law Mohkam Din. In 1891, Mohkam Din gifted the major portion of his land to his eldest daughter's son, but the collaterals (the present plaintiffs) by suit obtained cancellation of the gift. Mohkam Din's wife having died, the defendants who had then married came to reside with him about two years before his death. It seems Mohkam Din was then in failing health, one of plaintiff's witnesses (Buta) stating that Mohkam Din was ill for two or three years before his death. On the 4th February 1897 Mohkam Din stated to the patwari, who made a note of the statement in his diary that two years before he had married his daughter to Ala Bakhsh and made her his heir, and that she was in possession of his estate. On the 13th February 1897, a will was executed by Mohkam Din to the effect that Mussammat Muhammad Bibi and Ala Bakhsh had been married through him, and had resided with him and performed services for him ; that if he got well he would register a deed, but that in any case Mussammat Muhammad Bibi was to be his heir, and that he had given her possession.

On the 22nd May 1897 the patwari reported the death of Mohkam Din and detailed some of the above facts, but the Naib-Tahsildar, apparently without enquiry ordered mutation in favour of the collaterals as heirs, though Mussammat Muhammad Bibi was reported as in possession, the truth of which report is demonstrated by the collaterals having to bring this suit.

The evidence clearly shows the intention of Mohkam Din to have been to benefit at least some of his daughter's issue. There is some indication that he wanted Mussammat Muhammad Bibi's first husband, Shamas Din, who was his nephew, as a resident son-in-law. Failing in that Mohkam Din gifted the major portion of his estate to the son of another daughter. When that gift was set aside there can be no doubt that Mohkam Din acted as he stated to the patwari and as is recited in the will.

We have no hesitation in applying to the parties the custom of the *khanadamad* which is followed by other *gôts* of Muhammadan Jats in the same part of the Punjab, and though the *gôt* of the

parties finds no special mention in the *Riwaj-i-am*, probably because the members of that *gôt* are not numerous in the district, it must be taken to be included amongst those who gave replies as to the particular custom here in question, as exhibited in answers Nos. 10, 12 and 15 of the volume of Customary Law of the Gujrat District. We do not find it is therein laid down that the resident son-in-law must be the first husband of the daughter. Though C. A. No. 546 of 1882 of this Court is not exactly on-all-fours with the present case, the second husband was considered to have the *status* of a resident son-in-law. The principle underlying the custom is that the daughter and her issue should be benefited in consideration for her and her husband residing with, and performing services, (such as looking after the house and managing the land), for her father, and it is plain that a daughter's second husband could fulfil the above conditions, even though that husband, as in the present case happens to have been resident son-in-law in *his* first wife's family, his first father-in-law having died before the second marriage.

It is urged for appellants that possession should have followed the gift, and that, as to the will, Mohkam Din had no power of testamentary disposition of the whole of his estate. But we are not prepared to find either that possession did not pass, or that under the custom it was absolutely necessary that before Mohkam Din's death possession should be given to the resident son-in-law and daughter. The custom as worded appears to contemplate an inheritance and there are numerous decisions of this Court in which the succession has been upheld where there was no possession before death. (See *Shah Muhammad v. Mussammat Imam Bibi* ⁽¹⁾, *Karim Bakhsh v. Haku* ⁽²⁾, *Mehr Din v. Mussammat Niki* ⁽³⁾, *Muhammada v. Mussammat Gaurian* ⁽⁴⁾, *Nathu v. Mussammat Karam Bhari* ⁽⁵⁾, *Jowaya v. Mussammat Fazlan* ⁽⁶⁾ and *Mussammat Baggi v. Mamun* ⁽⁷⁾).

As to the will, the defendants do not take their stand on that alone, and it should be regarded only as emphasising the intention of Mohkam Din.

That plaintiffs were successful in suing to set aside the alienation to another daughter's son does not, we consider, affect the merits of the present case, the *khanadomad* custom being a separate custom, and one peculiarly in vogue in the district of the parties.

(1) 56, P. R., 1878. (4) 162, P. R., 1882.

(2) 24, P. R., 1879. (5) 15, P. R., 1884.

(3) 67, P. R., 1882. (6) 45, P. R., 1885.

(7) 31 P. R., 1895.

We have no doubt that Mohkam Din intended his estate to pass to his daughter, Mussammat Muhammad Bibi and her sons by Ala Baklsh, his resident son-in-law, and that he did, under the existent circumstances, all he could to ensure that intended succession, and that his acts towards that object were valid by custom.

The appeal is dismissed with costs.

Appeal dismissed.

No. 107.

Before Mr. Justice Reid.

HARNAM SINGH,—(DEFENDANT),—APPELLANT,

Versus

DEVI CHAND,—(PLAINTIFF),—RESPONDENT.

Civil Appeal No. 415 of 1901.

Custom—Alienation—Sale by sonless proprietor to stranger—Locus standi of reversioner—Bhandari Khatri of Vairawal, tahsil Tarn Taran, District Amritsar—Burden of proof—Agricultural tribe—Record-of-rights.

Khatri, although following agricultural pursuits, cannot be presumed to have adopted the general customs of agriculturists in matters of succession and alienations and the record-of-rights cannot operate to make a Khatri proprietor an agriculturist subject to customs which govern the latter. The presumption is that a Khatri is only bound by so much of the record-of-rights as deals with pre-emption and similar customs. The burden of proof therefore that a Khatri in matters such as alienation or succession is governed by custom rests always on the party alleging that he is so bound.

Found, upon the evidence that plaintiff had failed to establish that a sonless Bhandari Khatri of Vairawal in the Tarn Taran tahsil of the Amritsar District was governed by a custom prohibiting alienation by him of ancestral land without the consent of his collaterals.

Mussammat Pal Devi v. Fakir Chand ⁽¹⁾, *Jivan v. Hakam Khan* ⁽²⁾, *Uttam Singh v. Jhanda Singh* ⁽³⁾, *Hashim v. Nathu* ⁽⁴⁾, *Kartar Singh v. Mathar Singh* ⁽⁵⁾, *Khazan Singh v. Maddi* ⁽⁶⁾ and *Kanshi Ram v. Jivan* ⁽⁷⁾ referred to.

Miscellaneous appeal from the order of H. Scott-Smith, Esquire, Divisional Judge, Amritsar Division, dated 21st February 1901.

Ishwar Das, for appellant.

Muhammad Shah, for respondent.

The judgment of the learned Judge was as follows :

⁽¹⁾ 60, P. R., 1895.

⁽²⁾ 140, P. R., 1894.

⁽³⁾ 21, P. R., 1896.

⁽⁴⁾ 13, P. R., 1900.

⁽⁵⁾ 94, P. R., 1898.

⁽⁶⁾ 122, P. R., 1893.

⁽⁷⁾ 82, P. R., 1890.

REID, J.—The first question for decision is whether the remand should have been under Section 562 or Section 566 of the Code of Civil Procedure.

19th July 1901.

The Court of first instance framed five issues : (1) whether the land in suit was ancestral ; (2) whether the plaintiff, a Khatri, could object to the alienation ; (3) whether the suit was time-barred ; (4) whether the alienation was for necessity, in whole or in part ; (5) whether the plaintiff was estopped from suing.

It decided the first three issues against the plaintiff and dismissed his suit. The lower Appellate Court upset the finding on each of these issues, and remanded under Section 562. These issues are all of a preliminary nature and no authority against the remand under Section 562 has been cited. I see no reason for holding that the remand should have been under Section 566.

The pleader for the appellant does not contend that the suit is barred by limitation, or that the land in suit is not ancestral. The applicability of Punjab Act, I of 1900, need not be discussed, as the suit is within time under Act XV of 1877.

The second issue remains for decision.

The property in suit was owned by Ralla Ram, a Bhandari Khatri of Vairowal in the Tarn Taran *tohsil* of the Amritsar District. It is ancestral, and the plaintiff is a collateral of Ralla Ram. Vairowal is described in the Amritsar Gazetteer as a town, which, until 1891, formed a Municipality which included the three estates of Vairowal, Kiri Shahi and Darapur. The population in 1892 was 5,524, to which Darapur contributed half.

The land in suit is situate in Alampur. It is alleged by the pleader for the appellant, and not denied by counsel for the respondent, that there is no village, in the sense of an inhabited site or collection of houses, in Alampur, the allegation being that inhabitants of Vairowal and Darapur owned land there ; and Nathu, a witness for the respondent, deposed that Ralla Ram kept a shop at Darapur and actually lived at Kiri Shahi.

The fact that some Khatriis who own land in Kiri Shahi are described in the Revenue Records as *khudkasht* does not prove that they are agriculturists in the sense that they are dependent on agriculture as cultivators. They may keep land in their own hands, cultivating it through labourers, and still be described as *khudkasht*. The question is, do they form a village community ? *Mussammat Pal Devi v. Fakir Chand* (1) is in point on the question of the burden of proof, as it deals with Bhandari Khatriis of

(1) 60, P. R., 1895.

Batala in the Gurdaspur District, who were non-agriculturists, though holding land, and depended for their livelihood on avocations other than cultivation of land.

The rule therein laid down is that, in questions relating to alienation, the Court should, in the first instance, see whether there is any custom bearing on the point, but should not make any presumption in favour of the existence of such a custom and should leave that existence to be established by evidence of the parties.

Authorities which deal only with agricultural tribes, such as Jats, obviously do not apply.

The other authorities relied on for the respondent are the following:—

Jiwan and others v. Hakam Khan ⁽¹⁾, in which the parties were Manj Rajputs, and the *Riwaj-i-am* of the Tarn Taran *tahsil* was held to be a correct exposition of custom; and it is contended, that, inasmuch as this *Riwaj-i-am* was attested by Khattris, all Khattris are bound by custom. I cannot accede to this contention, and having regard to the facts on the record, I am unable to hold that the *Riwaj-i-am* makes custom applicable to the Khattris of Ralla Ram's family.

Uttam Singh and others v. Jhandu Singh ⁽²⁾, in which it was held that, by custom among agriculturists Bedis in the Hoshiarpur District, a sonless proprietor is not competent to make a gift of his ancestral estate in the presence of collateral heirs. The whole village belonged to a community of Bedis whose ancestors founded it some generations back. They formed a compact body, and, whatever the pursuits of their ancestors may have been, it was held that they were certainly, at the time, agriculturists.

The facts are clearly distinguishable from those of the present case.

Counsel for the respondent also relies on the record-of-rights of Alampur, of the 1852 Settlement, which provides that no proprietor can alienate without necessity, and also provides for the rights of widows and for the devolution of land on the re-marriage of a widow. The record-of-rights cannot operate to make a proprietor an agriculturist and subject to customs which govern agriculturists. A non-agriculturist proprietor is bound by so much of the record-of-rights as deals with pre-emption and similar

⁽¹⁾ 140, P. R., 1894.

⁽²⁾ 21, P. R., 1896.

customs, but in matters of succession and alienation he cannot be bound by custom and Hindu Law at the same time.

The remarks at page 50 of *Hashim v. Nathu* ⁽¹⁾ are not opposed to this view, and the passage in the record-of-rights relied on appears to have been taken bodily from the entries relating to Jats and other agricultural tribes. It is not contended that the Bhandari Khattris of Vairowal and Darapur have adopted *karewa* marriages and other Jat customs.

Civil Appeal No. 585 of 1898, in which the parties were Khattris of *tahsil* Lodhran, Mooltan, is in some respects similar to the present case. The learned C. J. and my brother Chatterji remarked therein: "The family has been pursuing agriculture for five generations and may be described as an agricultural family. It does not, however, follow that because a Khatri family follows agricultural pursuits it adopts the general custom of agriculturists. This was the view taken in *Kartar Singh v. Mathar Singh* ⁽²⁾, *Khazan Singh and others v. Maddi and others* ⁽³⁾, and *Kanshi Ram v. Jiwan* ⁽⁴⁾. We think therefore that it lay upon plaintiff "to prove that the gift was invalid."

The fact that Alampur was, at the Settlement of 1865, divided into two *tarafs* of equal area and revenue, and that the land has been in the possession of the Khatri family for about 100 years, does not, in my opinion, advance the respondent's case.

He has failed to establish the fact that Ralla Ram was governed by a custom which prohibited his alienating the land in suit without the consent of the respondent.

I decree the appeal, and restore the decree of the Court of first instance, with costs of all Courts.

Appeal allowed.

⁽¹⁾ 13, P. R., 1900.

⁽²⁾ 94, P. R., 1898.

⁽³⁾ 122, P. R., 1893.

⁽⁴⁾ 82, P. R., 1890.

No. 108.

Before Mr. Justice Reid.

MUSSAMMAT ZINAT,—(PLAINTIFF),—APPELLANT,

Versus

MURTAZA KHAN,—(DEFENDANT),—RESPONDENT.

Civil Appeal No. 439 of 1901.

APPELLATE SIDE. }

Jagir—Succession—Grant of Government revenue for life to parties' family in specific shares—Death of one sharer—Suit by the surviving sharer against the son of the deceased for certain instalments wrongfully enjoyed by the latter—Limitation—Limitation Act, 1877, Schedule II, Article 131—Construction of such grant—Pensions Act (XXIII of 1871), Section 6.

A *jagir* was granted to the family of the parties for life without any express provisions for survivorship. The *jagir* was to be divided into ten shares in three separate groups, the defendant's father and the plaintiff being two out of five sharers in group No. 2. The former died in 1868 and his share was peaceably enjoyed by his son until 1898, when the plaintiff filed a suit against the defendant on the allegation that two annual instalments proportionate to the defendant's father's share had been wrongfully enjoyed by the defendant who pleaded limitation, and argued that in his presence the plaintiff was not an heir to his father.

Held, that as no demand was made prior to those which immediately preceded this suit, the suit was within limitation under Article 131 of the Second Schedule of the Limitation Act.

Held also, that the words *ta hin hayat* (for life) applied to each group collectively, and not to the members of the group individually, the effect being that the members of each group were entitled to take by survivorship on the death of any member of that group.

Gahna v. Ikhlas Khan (¹) cited.

Further appeal from the decree of F. Field, Esquire, Divisional Judge, Peshawar Division, dated 31st March 1900.

Golak Nath, for appellant.

Muhammad Shah Din, for respondent.

The judgment of the learned Judge was as follows:—

19th July 1901.

REID, J.—This is a suit for certain instalments of Government revenue assigned after the mutiny to certain persons. The revenue assigned amounted to Rs. 1,000 per annum, divided between three groups of 2, 5 and 3 individuals in proportions of half, quarter and quarter, respectively.

The grant was for life *ta hin hayat gardid*, without any express provision for survivorship.

The plaintiff, whose legal representative is appellant, was a member of the second group, as was also the respondent's father, who died about 30 years before suit.

(¹) 154, P. R., 1889.

The suit is based on the allegation that two annual instalments, proportionate to the share of the respondent's father, have been wrongfully enjoyed by the respondent.

No demand was made prior to that which immediately preceded this suit, and the suit is, therefore, within limitation under Article 131 of the Second Schedule of the Limitation Act. *Gakna and others v. Ikhlas Khan and others* ⁽¹⁾ is in point.

A certificate under Section 6 of the Pensions Act, XXIII of 1871, that the case might be tried in a Civil Court, was granted by the Deputy Commissioner of the district. Various objections, based on the rules framed under Section 14 of the Act, have been urged against the validity of this certificate, but they have, in my opinion, no force. Most of the rules referred to by counsel for the respondent, included in group No. 5 are for the disposal, under Section 5 of the Act, by officers specified in the section of claims and Rules 43 and 44, the only rules in group No. 6 for reference to Civil Courts under Section 6 of the Act are not in my opinion exhaustive.

The terms of Section 6 are clear and refer to all claims to pension or grant of money or land revenue, and the powers conferred thereby on Deputy Commissioners are not, in my opinion, restricted by Rules 43 and 44.

The certificate is in my opinion valid. Rule 38 A is not binding, as a rule of interpretation, on Civil Courts. It is contained in group No. 5 which refers only to Section 5 of the Act, and is a direction to the officers specified therein only. The inclusion of the terms of Rule 38 A in the certificate granted is immaterial.

It remains to interpret the grant of the revenue in suit.

The words *ta him hayat* apply in my opinion to each group collectively, and not to the members of the group individually, the effect being that the members of each group take by survivorship on the death of any member of that group.

The grant was not hereditary, but it appears that the respondent was allowed possibly by a family arrangement or possibly as an act of charity, as alleged by the plaintiff, to enjoy his father's share. In any case he has failed to prove any title and the claim and appeal must be decreed.

I set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance, with costs of all Courts.

Appeal allowed.

No. 109.

Before Mr. Justice Reid.

WAZIR CHAND,—(PLAINTIFF),—APPELLANT,

APPELLATE SIDE. }

Versus

MAKHAN AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 709 of 1901.

Mortgage by conditional sale—Suit for foreclosure—Validity of notice for foreclosure—Regulation XVII of 1806, Section 8.

Held, that although a notice served on a mortgagor under Section 8 of Regulation XVII of 1806 need not contain any specification of the property in respect of which foreclosure is sought, the words “the property mortgaged” being a sufficient description, where the property mortgaged consisted of 4 *ghumaos* 3 *kanals* 19 *marlas* together with *shamilat* land in proportion to that area, which extended to nearly 12 *ghumaos* and the notice which had been served on the mortgagor only described the property as the area above-mentioned and made no specific mention of the *shamilat*, the notice was defective, inasmuch as it must have led the mortgagors to think that they were in danger of only losing 4 *ghumaos* and not 16 *ghumaos* by non-compliance with its terms.

Bura v. Jhanda ⁽¹⁾ and *Wali Muhammad v. Ramji Lal* ⁽²⁾ distinguished, *Baju Shah v. Hukmal* ⁽³⁾, *Fakira v. Piyare Lal* ⁽⁴⁾, and *Jivan Ram v. Amir Beq* ⁽⁵⁾ referred to.

Further appeal from the decree of Maulvi Inam Ali, Divisional Judge, Sialkot Division, dated 9th May 1901.

Turner and Bhagwan Das, for appellant.

The judgment of the learned Judge was as follows :—

31st July 1901.

REID, J.—The ancestor in title of the respondents mortgaged a specific area of 4 *ghumaos* 3 *kanals* 19 *marlas* by a deed which specifically mortgaged *shamilat* land in proportion to that area. In foreclosure proceedings notice was served on the mortgagor in respect solely of the area mortgaged, *i.e.*, 4 *ghumaos* 3 *kanals* 19 *marlas*. The Courts below have held that this notice cannot be construed as including the *shamilat* land to which the mortgagor was entitled as owner of the area mortgaged. This *shamilat* land extends to nearly 12 *ghumaos*, and the Courts below, holding that the mortgagor, who died several months before the expiry of the year of grace, and his representatives, the respondents, were led by the notice to think that the foreclosure would be in respect of the area specified in the notice only, and not in respect of the far larger area of *shamilat* land, were justified in holding that the mortgage was

⁽¹⁾ 113, P. R., 1900.

⁽³⁾ 42, P. R., 1897.

⁽²⁾ 5, P. R., 1901.

⁽⁴⁾ 21, P. R., 1901.

⁽⁵⁾ 38, P. R., 1901.

foreclosed only in respect of the area specified in the notice. The mortgage consideration was Rs. 158, bearing interest at 24 per cent. per annum, and the period was three years.

Counsel for the appellant cites *Baju Shah v. Hukma* ⁽¹⁾, *Bura and another v. Jhanda* ⁽²⁾, *Wali Muhammad v. Ramji Lal* ⁽³⁾, *Fakira v. Piyare Lal* ⁽⁴⁾, and *Jiwan Ram v. Amir Beg* ⁽⁵⁾ as authority for the proposition that the foreclosure is in respect of the whole area mortgaged, including the *shamilat*.

Of the authorities cited *Bura v. Jhanda* ⁽²⁾ and *Wali Muhammad v. Ramji Lal* ⁽³⁾ only can be held to be to any extent directly in point, and they are distinguishable. In the earlier of the two a share in a *patti* was sued for and a specific area was decreed on a compromise. It was held that the decree-holders could afterwards sue for a proportionate share of *shamilat* which was partitioned more than thirty years after the first suit.

In the later authority it was held that the notice served on the mortgagor need not contain any specification of the property in respect of which foreclosure was sought, but that the words "the property mortgaged" would be sufficient description. It was held that a slight inaccuracy in that which could perfectly well have been entirely left out did not invalidate the notice.

The facts dealt with differ widely from those in the present case. The lower Appellate Court has held that the respondents were, as a fact, misled by the specification in the notice, and I see no reason for interfering with that finding in second appeal, under Section 70 (b) of the Courts Act. This being the case, something more than a slight inaccuracy in the description has to be dealt with. Had the notice merely contained the words: "the property mortgaged," instead of the specific area above-mentioned, the appellant would have been in a different position. I cannot hold that mortgagors, who have been led by the notice issued to think that they are in danger of losing 4 *ghumaos* by non-compliance with the terms of the notice, can be deprived of 16 *ghumaos* by such non-compliance.

On the facts found it is unnecessary to consider whether a transfer of a specific area of land ordinarily carries with it *shamilat* in proportion to that area.

The appeal fails, and is dismissed with costs. No pleader's fee, the respondents being unrepresented.

Appeal dismissed.

⁽¹⁾ 42 P. R., 1897.

⁽³⁾ 5 P. R., 1901.

⁽²⁾ 113 P. R., 1900.

⁽⁴⁾ 21 P. R., 1901.

⁽⁵⁾ 38 P. R., 1901.

No. 110.

Before Mr. Justice Robertson.

AZIM KHAN,—(DEFENDANT),—APPELLANT,

APPELLATE SIDE, }

*Versus*MUHAMMAD RIAZ-UD-DIN AND OTHERS,—(PLAINTIFFS),—
RESPONDENTS.

Civil Appeal No. 342 of 1901.

Partnership—Suit by partner against co-partner who was also manager of the business to have an account rendered of his stewardship—Accounts without dissolution—Contract Act, 1872, Sections 213, 258.

Held, that although there is a sound general principle that one partner should not be allowed to sue a co-partner for an account without at the same time claiming a final settlement of all questions between them, and a dissolution of partnership, yet in exceptional cases where equity requires such a course the general principle should be relaxed, and one partner may be allowed to file a suit against his co-partner for account without praying for dissolution of the partnership.

Phula and Dana v. Shib Dial ⁽¹⁾, *Narain Das v. Bholi* ⁽²⁾, and *Kussa Mal v. Gopi* ⁽³⁾ referred to. *Wallworth v. Holt* ⁽⁴⁾, *Richards v. Davies* ⁽⁵⁾, and *Hichens v. Congreve* ⁽⁶⁾ cited.

Miscellaneous appeal from the order of S. Clifford, Esquire, Divisional Judge, Delhi Division, dated 6th April 1901.

Chatterji, for appellant.

Muhammad Shafi, for respondents.

The judgment of the learned Judge was as follows:—

5th July 1901.

ROBERTSON, J.—The facts of this case are set forth in the judgments of the lower Courts.

The plaintiffs and defendant are partners in respect of certain contracts, and in addition to being a partner, the defendant is also manager, receiving remuneration for his services as such. The plaintiffs allege that defendant has not acted straightforwardly in respect of his management of the partnership affairs, and sue him to have an account rendered of his stewardship. The defendant pleaded *inter alia* that such a suit could not lie except in conjunction with a prayer for a dissolution of partnership, and the first Court accepted this view and dismissed the claim. On appeal, however, the learned Divisional Judge held that the suits would lie, and accepted the appeal and returned it for decision on the merits under Section 562. This, therefore is the only point which I have to deal with.

⁽¹⁾ 34 P. R., 1873.⁽⁴⁾ 48 R. R., 187.⁽²⁾ 71 P. R., 1881.⁽⁵⁾ 34 R. R., 111.⁽³⁾ I. L. R., IX All., 120.⁽⁶⁾ 32 R. R., 173.

No doubt it is a sound general principle that one partner should not be allowed to sue a co-partner for an account without at the same time claiming a final settlement of all questions between them, and a dissolution of partnership. This view has been taken in various rulings quoted to me, *inter alia*, *Phula and Dana v. Shib Dial and others* (1), *Narain Das v. Bholi* (2), and *Kassa Mal v. Gopi* (3), and the correctness of the general principle is not contested. But the general rule is clearly subject to exceptions, and these exceptions have been more numerous of late years in recognition of the necessities of commercial communities and the dictates of equity. The matter is fully discussed in Lindley on *Partnership* and at pages 496-97 (6th edition), there are many very apposite remarks. The author of that text-book remarks that there are three classes of cases in which actions for an account without a dissolution are particularly common, and one of these is when one partner has sought to withhold from his co-partner the profit arising from some secret transaction. It is quite clear that great injustice might, under certain circumstances, be done to a partner or partners, by a refusal to allow them to bring a peccant partner to book in regard to some particular transaction or series of transactions, without at the same time compelling them to sue for a dissolution of partnership. The views expressed in Lindley on *Partnership* are supported by those enunciated by Lord Cottenham in *Wallworth v. Holt* (4) to the following effect:—"The question is whether some partners having an interest in the application of the partnership property, are entitled, on behalf of themselves and the other partners, except the defendants, to sue such remaining partners in this Court for that purpose, pending the subsistence of the partnership; and if it shall appear that such a suit may be maintained by some partners on behalf of themselves and others . . . against other persons whether trustees or agents for the Company or strangers being possessed of the property of the Company, it may be asked why the same right of suit should not exist when the party in possession of such property happens also to be a partner or shareholder."

Similarly in *Richards v. Davies* (5) in the Rolls Court, Leach, M. R., remarked :

"In support of the judgment in the Court below, it is contended that a Court of Equity cannot entertain a suit for a part-

(1) 34 P. R., 1873.

(3) I. L. R., IX All., 120.

(2) 71 R. R., 1881.

(4) 48 R. R., 187.

(5) 34 R. R., page 111.

“nership account unless the bill seeks a dissolution of the partnership.”

“The plaintiff, for monies due to him on a partnership account has no relief at law, and if a Court of Equity refuses him relief he is wholly without remedy. This would be contrary to the plain principles of justice, and cannot be the doctrine of equity.”

Similarly in *Hichens v. Congreve* (1) it was held that some shareholders in a Joint Stock Company could sue the Directors to refund money improperly withdrawn from the stock of the Company.

These decisions show that where equity requires such a course the general principle that one partner cannot sue another for an account without also praying for a dissolution must be relaxed.

Section 258 of the Contract Act also clearly supports this view, enacting that—“A partner must account to the firm for any benefit derived from a transaction affecting the firm,” the obvious inference being that if he fail to do so he may be compelled to fulfil the obligation by suit, and Section 259 would also appear to be in point. “Every wrong must have its remedy,” and special wrongs caused by one partner to others have their special remedy by special suit. But in this case the defendant is also Manager and Agent for the firm, and as such, under Section 213, Contract Act, may clearly be called on for an account.

It is alleged in this case that the defendant has prevented plaintiffs from obtaining payments due to the Company for work done in Rampur and tried to obtain the same for himself, and it is claimed that defendant may be called upon to render accounts and to pay plaintiff rateably out of the amount which may be found due by him.

Some of the contracts being worked for the partnership are incomplete, and, following the principles laid down above, it appears to me that the plaintiffs are in equity entitled to bring a claim in the present form. The appeal is, therefore, dismissed. Costs will be costs in the suit both in this Court and in the lower Appellate Court.

Appeal dismissed.

(1) 32 R. R., 173.

No. 111.

Before Mr. Justice Clark, Chief Judge, and Mr. Justice Reid.

ASA RAM,—(DEFENDANT),—APPELLANT,

Versus.

KAURA (PLAINTIFF),

AND

AHMAD (DEFENDANT),—

RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 613 of 1898.

Pre-emption—Sale of share of joint estate—Vendor, purchaser and pre-emptor all three being co-sharers in the joint estate—Vendor's election where parties are equally entitled—Punjab Laws Act, 1872, Section 12 (a).

The plaintiff sued for possession by pre-emption of land sold by his brother to the defendant, all three being co-sharers, together with several others who had not elected to claim their right in the joint estate including the land in dispute. The purchaser pleaded that the penultimate clause of Section 12 defeated the plaintiff's claim.

Held, that under clause (a) of Section 12 of the Punjab Laws Act, 1872, the plaintiff was entitled to half the bargain on payment to the purchaser of half the price, the right of pre-emption under such circumstances being a joint right of the co-sharers, and that the penultimate clause of that section did not apply to such cases.

Gami v. Sahib ⁽¹⁾, *Karim Bakhsh v. Khuda Bakhsh* ⁽²⁾, *Ishar Singh v. Mangal Singh* ⁽³⁾, *Bhag v. Muhammad Yar* ⁽⁴⁾, and *Mughal v. Jalal* ⁽⁵⁾ distinguished.

Ahmad Din v. Mussammatt Hasso ⁽⁶⁾ cited.

Further appeal from the decree of R. L. Harris, Esquire, Divisional Judge, Derajat Division, dated 8th February 1898.

Ram Bhaj Datta, for appellant.

Gokal Chand, for respondents.

The judgment of the Court was delivered by

REID, J.—The plaintiff-respondent sued for possession, by pre-emption, of land sold by his brother to the appellant, all three being co-sharers in the joint estate, which includes the land in suit. Section 12 (a) of the Punjab Laws Act therefore applies, no special custom being set up. The pleader for the appellant contends that, inasmuch as the vendee and the respondent were equally entitled to the right to pre-empt, the vendor could determine, under the penultimate paragraph of the section, which of them should exercise the right and did determine in favour of the

⁽¹⁾ 91 P. R., 1875.

⁽²⁾ 20 P. R., 1881.

⁽³⁾ 117 P. R., 1883.

⁽⁴⁾ 17 P. R., 1884.

⁽⁵⁾ 69 P. R., 1898.

⁽⁶⁾ 54 P. R., 1882.

appellant. *Ahmad Din v. Mussammat Hasso* ⁽¹⁾ is opposed to this contention, but reliance is placed on *Gami v. Sahib* ⁽²⁾, *Karim Bakhsh v. Khuda Bakhsh* ⁽³⁾, *Ishar Singh v. Mangal Singh* ⁽⁴⁾, *Bhag v. Muhammad Yar* ⁽⁵⁾ and *Mughal v. Jalal and others* ⁽⁶⁾.

The first of these rulings does not apply, as Section 14 of Act IV of 1872, which corresponded to Section 12 of the Act, as amended, did not contain a clause corresponding to clause (a) of Section 12.

In *Karim Bakhsh v. Khuda Bakhsh* ⁽³⁾ it was held that the penultimate clause of Section 12 simply embodies the principle, laid down in many cases under the unamended Act, that a sale to one of two or more persons with equal rights of pre-emption cannot be disturbed by the others, and that a vendor cannot elect between rival pre-emptors after he has parted with his property. No question of the application of the penultimate paragraph to the vendee appears to have arisen. In *Ishar Singh v. Mangal Singh* ⁽⁴⁾ it does not appear that the transaction was governed by Section 12 (a) or that the parties had joint rights. In *Bhag v. Muhammad Yar* ⁽⁵⁾ Section 12 (d) was held to apply. In *Mughal v. Jalal* ⁽⁶⁾ the judgment runs: "The other point, viz., the 'right of plaintiff to share in the bargain (*Ahmad Din v. Mussammat Hasso* ⁽¹⁾) as having equal rights with the vendees, was not taken in the first Court, and was apparently not pressed before the Divisional Judge. The ruling quoted is totally inapplicable to the present case. It was there held that in the circumstances of that case, 'the right of pre-emption was a joint right of the plaintiff and 'the purchaser, and by buying a share he has exercised their rights 'as well as his own.' It cannot be seriously argued that there was 'any community of interests between the plaintiff in this case and 'the vendees, or generally that a purchaser must be held to take on 'behalf of all persons who have an equal right of pre-emption '(with him) in the property. See *Bhag v. Muhammad Yar* ⁽⁵⁾ on 'this point."

Now, in this ruling, already referred to, it was held that, inasmuch as the rest of the share-holders had stood aside and the claim was brought by one share-holder only, asserting his individual right, clause (c) did not, and clause (d) did, apply, and that the penultimate paragraph of the section must take effect, no joint claim having been made by the vendors, and the plaintiff and the purchaser each having a separate right to accept an offer

⁽¹⁾ 54 P. R., 1882.

⁽²⁾ 91 P. R., 1875.

⁽³⁾ 20 P. R., 1881.

⁽⁴⁾ 117 P. R., 1883.

⁽⁵⁾ 17 P. R., 1884.

⁽⁶⁾ 69 P. R., 1893.

of sale. The judgment continued: "*Ahmad Din v. Mussammat Hasso* (1) does not apply, as in the present case there were other proprietors in this *patti*, and their shares were not ascertained, whereas in the case quoted the plaintiff and the purchaser were joint owners, each holding one-half of the land."

The distinction between "proprietors in the *patti*" and "joint owners" is noticeable, and it is also noticeable that Barkley, J., who was a party to the judgment in *Ahmad Din v. Mussammat Hasso* (1) was also a party to the judgment in *Bhag v. Muhammad Yur* (2). Clauses (a) and (b) of the section prescribe the rights of co-sharers with the vendor, while the rest of the clauses deal with the rights of persons other than such co-sharers. Moreover clause (c) provides for cases in which landowners do, and clause (d) provides for cases in which they do not, claim jointly, clause (a) contains no distinction between joint and several claims. In the present case, although the vendor-appellant and plaintiff-respondent were not the only co-sharers, the shares of all the co-sharers were ascertained, and the remaining co-sharers might have claimed to share in the purchase had they elected to claim. The fact that they did not claim does not, in our opinion, affect the applicability of *Ahmad Din v. Mussammat Hasso* (1) to the facts before us. We see no reason to hold that the rule laid down therein is erroneous, and we hold that the penultimate paragraph of the section does not apply to defeat the respondent's suit.

The appeal fails, and is dismissed with costs.

Appeal dismissed.

No. 112.

Before Mr. Justice Robertson.

BADRI DAS,—(DEFENDANT),—APPELLANT,

Versus

NATHU MAL,—(PLAINTIFF),—RESPONDENT.

} APPELLATE SIDE.

Civil Appeal No. 586 of 1900.

Suit for malicious prosecution—Reasonable and probable cause—Malice—Conviction of plaintiff by two Courts—Damages—Measure and assessment of damages.

Where the charge was brought by a defendant upon untrue facts which were entirely within his own knowledge and the plaintiff was convicted by two Courts upon what was held by the Chief Court (while holding the plaintiff's action also to have been actuated solely by malice) to be a wrong view of the law as applied to the facts found,

(1) 54 P. R., 1882.

(2) 17 P. R., 1888.

Held that the defendant had no reasonable and probable cause for the charge, which was malicious in the legal sense, and that the plaintiff's action having been also actuated solely by malice, the measure of damages awarded should be under such circumstances of the smallest possible dimensions.

Bhagwant Singh v. Pandit Joti Sarup ⁽¹⁾, *Hira Chand Banerji v. Banee Madhub Chatterji* ⁽²⁾, *Ganga Parshad v. Ramphul Sahoo* ⁽³⁾, and *Johnstone v. Sutton* ⁽⁴⁾ cited. *Hall v. Venkata Krishna* ⁽⁵⁾, distinguished.

Further appeal from the decree of Khan Bahadur Sayad Muhammad Latif, Additional Divisional Judge, Rawalpindi Division, dated 19th February 1900.

Shadi Lal, for appellant.

Ishwar Das, for respondent.

The judgment of the learned Judge was as follows :

12th July 1901.

ROBERTSON, J.—The facts of this case are given very fully in the judgments of the lower Courts.

It appears that one Badri Das had a contract with the Commissariat Department in Rawalpindi. One Nathu Mal, actuated by ill-feeling and malice, as has been found by three Courts, wrote repeated letters to the Commissariat Department officials pointing out that, in contravention of rules, Badri Das was not in fact the sole partner in the contract, but that Badri Das' father, Umrao Singh, and another, Amar Das, were co-partners, the latter, Amar Das, having been notified as a person to whom no more contracts were to be given. It was also pointed out that Badri Das in contravention of his contract was supplying plain-grown potatoes instead of hill-grown potatoes. No action appears to have been taken on these letters by the Commissariat Department, but Badri Das brought a criminal charge under Section 500, Indian Penal Code, against Nathu Mal. The Magistrate convicted him, and the conviction was upheld on appeal to the Sessions Judge. The first Court considered that Badri Das came very badly out of the case, and that the allegations made were in fact true. The Sessions Judge held the concealment of co-partners to have occurred, but to be unimportant, and that the substitution of plain-grown for hill-grown potatoes was known to, and accepted by, the Commissariat Department. The Chief Court on revision held that the accused Nathu Mal was protected by Explanation I to Section 499, as the imputations were made for the

⁽¹⁾ 4 P. R., 1897.

⁽³⁾ 20 W. R., 177.

⁽²⁾ 6 W. R., 29.

⁽⁴⁾ 1 R. R., 269.

⁽⁵⁾ I. L. R., XIII Mad., 394.

public good, the association of Amar Das in the contract being particularly objectionable, seeing that he had been prohibited from holding contracts from the Commissariat Department, and being just the class of person against whom clause 14 in the contract with Badri Das, and which was, it appears, specially signed by Badri Das, was directed. They also considered that the substitution of plain-grown for hill-grown potatoes was dishonest. The conviction was accordingly set aside. Nathu Mal then tried to get sanction to prosecute Badri Das, but failed, and then brought a suit for damages for malicious prosecution. He obtained a verdict and decree in the first Court for Rs. 1,182-12-9, and in the second Court the decree was reduced to Rs. 556-12-9. A further appeal has been made to this Court by the defendant Badri Das.

It may now be taken as settled law, accepted, *inter alia*, in *Bhagwant Singh v. Pandit Joti Sarup* ⁽¹⁾ that to sustain an action for malicious prosecution five factors must co-exist, (1) a prosecution of the plaintiff by the defendant, (2) want of reasonable and probable cause for the prosecution, (3) malice, express or implied, (4) the determination of the prosecution in favour of the party prosecuted, (5) loss or damage caused to that party by the prosecution. If any one of these factors is absent, no action will lie.

The existence of (1), (4) and in some measure of (5) is not contested. It is, however, contended by the defendant that the absence of reasonable and probable cause has not been shown by the plaintiff, upon whom it lay to show that none existed, and that malice is not proved. As regards "malice" there is not much need for discussion here; the parties are on the worst of terms with each other, and even after Nathu Mal had been convicted and fined in the first Court, Badri Das pressed for an enhancement of sentence. Further, no doubt the lower Courts are correct in holding that malice might be implied by a complete absence of reasonable and probable cause, though this inference may be negatived. *Hall v. Venkata Krishna* ⁽²⁾, relied on by appellant's counsel, dealt with a question of honest belief in information received from others, and is distinguishable from this case. The view taken here is supported by the judgments reported in *Hira Chand Banerji v. Bance Madhub Chatterji* ⁽³⁾, *Ganga Parshad v. Ramphul Sahoo* ⁽⁴⁾, and in the judgment in *Johnstone v. Sutton* ⁽⁵⁾.

⁽¹⁾ 4, P. R., 1897.

⁽²⁾ 6, W. R., 29.

⁽³⁾ I. L. R., XIII Mad., 394.

⁽⁴⁾ 20, W. R., 177.

⁽⁵⁾ 1, Term Rep. 545; 1, R. R., 269.

The main point therefore for consideration in this case is whether or not the defendant had reasonable and probable cause for the charge he brought against Nathu Mal.

No doubt the fact that there has been a conviction by even one Court is a very material point in favour of a defendant in such a suit, and in some cases it might even be taken as sufficient proof that there was reasonable and probable cause for the charge. But the proposition put forward by the learned counsel for appellant that such a conviction is in all cases sufficient to bar the suit, is one, which I venture to think, could not now be accepted anywhere, much less in this country, where the possibility of snatching a conviction upon suborned and false evidence is by no means remote. Nor do the authorities quoted go to that length. The principle underlying these rulings generally appears to be that if a state of facts which induced an independent and impartial tribunal to convict an accused existed, the existence of those facts justified the person who made it in making the charge although it might subsequently be proved to be without foundation. In this country the inference would not be so strong as it might be elsewhere. Indeed in *Alexander on Torts*, page 236, doubts are expressed whether it is really necessary in this country that the conviction should be set aside before a suit for malicious prosecution can be brought. The present case belongs, however, to a totally different category. The charge was brought by the complainant, Badri Das, upon a state of facts entirely within his own knowledge, and not upon an opinion formed on extraneous facts, and he is fixed with an absolute knowledge of all the facts upon which the charge was based. Does the fact that two Courts were induced by the submission of Badri Das' case to convict the accused upon what was held to be a wrong view of the law as applied to the facts by the Chief Court, show conclusively that he had reasonable and probable cause for his charge. Under the peculiar circumstances of the case I do not think that it can be held to do so. The allegations made originally in the complaint by Badri Das were not true. He alleged that Nathu Mal's statements regarding the supply of plain-grown instead of hill-grown potatoes were untrue, and it was proved that they were true. He said in his examination that he alone took the contract, and it was clearly proved that Amar Das and another were sharers, and it is perfectly certain that Badri Das must have known that in joining Amar Das and concealing the fact he was acting most improperly.

Considering these and all other facts disclosed on the record, I think it must be held that Badri Das had no reasonable and

probable cause for the charge, and that the charge was malicious in the legal sense.

There remains the question of damages. The damages under a different system would be assessed by a jury, and in assessing them every aspect of the questions would most properly be considered. The Courts in this country have in such cases to discharge the duties of a jury. In this case it can hardly be doubted that no jury would be likely to award more than "one farthing" damages.

The two first Courts in the criminal charge brought by Badri Das convicted Nathu Mal. He was only acquitted by this Court on a point of law, the learned Judges recording that Nathu Mal in writing his letters to the Commissariat Department had been actuated "solely by malice." Under these circumstances what should be the measure of damages awarded? I think they should be of the smallest possible dimensions.

I accordingly so far accept the appeal as to assess the damages at rupees five (5) only, and I further direct that each party shall pay his own costs throughout. The cross-appeal is also dismissed, each party paying his own costs.

No. 113.

Before Mr. Justice Reid and Mr. Justice Chatterji.

RAM DAS AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

AMIR SHAH AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 1244 of 1898.

Common land—Purchase of separate holding in a village—Suit by purchaser for a declaration that he is entitled to a share in the shamilat—Inclusion or exclusion of share of shamilat—Burden of proof.

Held, that as the rights of a proprietor in the shamilat of a village are not a mere accessory to the land separately held by him, a sale of the latter does not *ipso facto* convey any rights in the former to the purchaser.

A clause in the *Wajib-ul-awz* providing that shares in the shamilat are proportional to the *khewat* lands held by each proprietor cannot confer any rights in the common land on the purchaser not conveyed by his deed of sale.

Maluk Singh v. Muhammad ⁽¹⁾ and *Boju Shah v. Hukma* ⁽²⁾ cited; and *Prem Chand v. Sardara* ⁽³⁾ referred to.

⁽¹⁾ 65, P. R., 1889. ⁽²⁾ 42, P. R., 1897.

⁽³⁾ 10, P. R., 1894.

Further appeal from the decree of J. G. M. Rennie, Esquire, Divisional Judge, Mooltan Division, dated 6th June 1898.

Ganpat Rai, for appellants.

Oertel, for respondents.

The judgment of the Court was delivered by

17th July 1901.

CHATTERJI, J.—The material facts are given in the judgment of the first Court. It is only important to note that the plaint contains no allegation that the disputed *shamilat* was transferred with the shares in the well Sabawala, admittedly sold to the plaintiffs. The claim is apparently based on the ground that by reason of the purchase, plaintiffs are *khewaldars* in the village and, as such, are entitled to a proportionate share of the *shamilat* under the *Wajib-ul-arz*, clause 14.

The judgment of the Divisional Judge is curt and unsatisfactory, but we are of opinion that his conclusion is right, though his reasoning is lame.

It has been repeatedly held by this Court (*Maluk Singh v. Muhammad* ⁽¹⁾ and *Baja Shah v. Hukma* ⁽²⁾), that the rights of a proprietor in the *shamilat* of a village are not a mere accessory to the land separately held by him, and that where a person comes into court alleging purchase of the former, the *onus* of establishing it is on him, which is not discharged by proof that lands of separate *khata*s have been sold to him.

Shamilat lands are lands held in joint ownership with other proprietors of the *patti* or village, as the case may be, and there can be in the nature of things no necessary presumption that they are transferred because the separate land of the proprietor is transferred. Frequently they are more valuable than the individual holdings of the village owners. The clause in the *Wajib-ul-arz* relied on by the plaintiffs, merely fixes the measure of the right of the proprietors in the *shamilat* with reference to their separate or *khewat* lands, presumably in accordance with custom and mutual agreement among them. The rule so laid down is to be acted on at the time of partition, but it does not follow that because the *khewat* land has been sold, the *shamilat* land must be given to the purchaser without his paying for it, or its being transferred to him, or must lapse to the rest of the proprietary body. A clause in the *Wajib-ul-arz* meant to define the rights of the village owners in the *shamilat* for the purpose of partition cannot be construed to work forfeiture of valuable interests in

(¹) 65, P. R., 1889. (²) 42, P. R., 1897.

property in this manner. The contention appears to us to be wholly untenable.

It is contended also that the issues did not allow the plaintiffs to prove sale of the *shamilat*. If it was part of their case that rights in it were sold with the shares in the well the second issue was sufficiently comprehensive to allow them to prove it, but as already pointed out, plaintiffs never asserted having purchased any rights in *shamilat* and merely insisted that they necessarily got such rights in proportion to the *khewat* land they purchased under the *Wajib-ul-arz*. Thus this contention fails also, and we are not prepared to grant them a remand at this stage to produce more evidence.

The plaintiffs alleged possession and enjoyment of profits of the *shamilat*, as well as having sunk a well in conjunction with one Hira Nand, a kinsman of theirs, who is also a co-sharer in the Subawala well. The proof adduced in support of these allegations is not at all convincing. Hira Nand was not called, and the *patwari* was not questioned as to these matters, nor were any account books produced to show the expenditure incurred in sinking the well. If plaintiffs had been proprietors in the *shamilat*, or had claimed to have purchased a share therein, such possession might have been valuable proof of their having enjoyed their right, or of their claim being true, but as it is, their possession, even if proved, cannot confer any proprietary right. But in fact their possession is not proved. We do not consider *Prem Chand v. Sardara and others* ⁽¹⁾ at all in point in plaintiffs' favour as they contend.

We think the plaintiffs' claim has been rightly disallowed by the Divisional Judge, and we therefore dismiss their appeal with costs.

Appeal dismissed.

No. 114.

Before Mr. Justice Robertson and Mr. Justice Maude.

MOHAN LAI,—(PLAINTIFF).—APPELLANT,

Versus

MUKIM AND OTHERS,—(DEFENDANTS).—RESPONDENTS.

Civil Appeal No. 100 of 1899.

} APPELLATE SIDE.

Mortgage—Interest—Post diem interest—Absence of covenant to pay interest after a certain date when the mortgage if not redeemed was to become a usufructuary one—Damages—Construction of document.

⁽¹⁾ 10, P. R., 1894.

On 16th June 1886 certain land was mortgaged to the plaintiff on the condition that the mortgagors will redeem in one year paying the principal debt and interest and in case of default the mortgagee will be competent to take possession of the land in lieu of the principal sum and interest. The mortgagors having failed to pay the amount due under the mortgage the plaintiff filed a suit in 1898 for possession of the land in lieu of principal and interest up to that date.

Held, that as the mortgage was to be a simple one for the period of one year and if not redeemed by that time was to be converted into a usufructuary one with possession and that as there was no express indication in the deed that after the expiration of the year the mortgagee was to be at liberty to wait as long as he pleased before taking possession, the plaintiff was not entitled to any interest after due date.

Ghasita Mal v. Ishar Das ⁽¹⁾, *Sheo Chand v. Chunna* ⁽²⁾, and *Mathura Das v. Raja Narindar Bahadur* ⁽³⁾ referred to.

Further appeal from the decree of A. Kensington, Esquire, Divisional Judge, Jullundur Division, dated 14th November 1898.

Shib Das, for appellant.

Muhammad Shah Din, for respondents.

The judgment of the Court was delivered by

1st Augt. 1901.

MAJDE, J.—This is a certificate appeal, the Divisional Judge having certified that there is a question of law involved, namely, whether certain rulings of this Court *Ghasita Mal v. Ishar Das* ⁽¹⁾ and *Sheo Chand v. Chunna* ⁽²⁾ should be considered as superseded by the Privy Council Ruling reported in *Mathura Das v. Raja Narindar Bahadur* ⁽³⁾. The wording of the certificate is not very happy, but we understand it to mean that there is a question of law involved, namely whether with reference to the ruling of the Privy Council, the mortgage-deed in question must be construed as entitling the plaintiff-appellant to claim interest for the period subsequent to the expiration of the period fixed for the redemption of the mortgage, and up to the date of the mortgagee's obtaining possession of the land. The terms of the deed are that the mortgagors will redeem the land in one year, paying the principal debt and interest at the rate of 1 per cent. per mensem and in case of default the mortgagee may take possession of the land in lieu of (receiving) the principal sum and interest. Both the lower Courts have interpreted the deed as meaning that the mortgage was to be a simple one for the period of one year, and if not redeemed by that time, was to be converted into a usufructuary mortgage with possession. We see no reason for holding that this is a construction in favour of an unusual or

⁽¹⁾ 8, P. R., 1890. ⁽²⁾ 73, P. R., 1892.

⁽³⁾ I. L. R., XIX All., 39.

improbable intention on the part of the parties to the contract. There is no express indication in the deed that, after the expiration of the year, the mortgagee was at liberty to wait as long as he pleased before taking possession, and to swell the amount of interest, thus placing the mortgagors in the position of being probably unable ever to discharge the debt: such an arrangement may reasonably be considered as not contemplated by them. On the other hand the strictest construction of the words employed favours the view which the Lower Courts have adopted, and we can find nothing in their Lordships' judgment which precludes the adoption of that view. The terms of the document therein discussed differed materially from those of the deed now under consideration, and we hold that there has been no disregard of conditions indicating the intention of the parties to it. We accordingly dismiss the appeal with costs.

Appeal dismissed.

No. 115.

Before Mr. Justice Robertson and Mr. Justice Maule.

FAIZ BAKHSH AND OTHERS—(PLAINTIFFS),—

APPELLANTS,

Versus

DITTA AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 593 of 1899.

Custom—Alienation—Alienation of occupancy rights—Right of reversioner to restrain such alienation—Burden of proof—Punjab Tenancy Act, 1887, Sections 53, 56, 60.

Held, that when a collateral of an occupancy tenant seeks to restrain an alienation which has not been objected to by the landlord he has to prove the existence of a custom by which he is entitled to do so, *i. e.*, the burden of proof is upon the collateral asserting the rights to restrain the alienation.

Karam Din v. Sharaf Din ⁽¹⁾, and *Kidaru v. Banna* ⁽²⁾ referred to.

Further appeal from the decree of Kazi Muhammad Aslam, C. M. G., Divisional Judge, Jhelum Division, dated 5th December 1898.

Krishen Singh, for appellants.

Golak Nath, for respondents.

The judgment of the Court was delivered by

ROBERTSON, J.—One Allah Din, an occupancy tenant under Section 6 of the Tenancy Act, transferred his holding to one 2nd Augt. 1901.

⁽¹⁾ 89, P. R., 1898.

⁽²⁾ 31, P. R., 1896.

} APPELLATE SIDE.

Ditta, without taking the preliminary steps required by Section 53 of the Tenancy Act. The reversioners of Allah Din now sue for a declaration that the alienation shall not affect their reversionary rights after the death of Allah Din. The landlord has stood completely aside.

Both the lower Courts have dismissed the suit, but, on appeal to this Court, it has been urged that the burden of proving their right to contest the alienation has been wrongly laid upon the plaintiffs, and the judgment, delivered by a Full Bench of this Court in *Karam Din v. Sharaf Din* ⁽¹⁾ has been relied upon in support of this view, and it is urged that the views of certain learned Judges expressed in the judgment in *Didaru and others v. Banna and others* ⁽²⁾ that it lay on the reversioners in such a case to prove that they have a right by custom to contest such an alienation, have been declared to be only *obiter dicta* in the later judgment, and have been dissented from therein.

That they have been declared to be *obiter dicta* is clear, and they themselves only purport to be so; how far they have been dissented from is, however, not so clear and will be discussed later on.

In *Didaru and others v. Banna and others* ⁽²⁾, the learned Chief Judge (Roe, C. J.), remarked: "The former (*i. e.*, the reversioners of an hereditary tenant) would have to prove that by custom they could restrain the alienation, and it would not necessarily follow that if the power of alienating ancestral proprietary land was restricted the power of alienating a tenancy would be equally so."

RIVAZ, J., said: "When, however, an alienation takes place, unauthorized by the landlord but unchallenged by him, I should, as at present advised, (though the question is not really before us) hold that it would be open to the heirs entitled to succeed to question the alienation if they could establish a custom giving them a right to do so in the case of an occupancy holding."

Karam Din v. Sharaf Din ⁽¹⁾ was a case in which a question regarding the succession to a right of occupancy was in dispute. The question referred to the Full Bench in the words of Walker, J., who made the reference, was stated to be as follows:—

"The question comes to be this—must the field of inquiry as to custom in cases like the present one be limited to instances concerning occupancy rights, or does Section 59 (2) put questions

(1) 89, P. R., 1898.

(2) 31, P. R., 1896.

“that arise in connection with succession to occupancy rights on the same footing as those connected with succession to proprietary rights in land?”

The second part of this question was answered by the Bench, Walker, J., expressing some doubts, in the negative, and the first part of the question in the negative also.

It is quite clear that that judgment does not decide the question now before us. All that is there decided is that, in inquiries regarding the rights of succession (and apparently of reversioners, though this was not before the Bench specifically), which lie outside the purview of the Tenancy Act, the custom shown to obtain regarding similar rights in land, held in proprietary right in the village in which the occupancy holding is situate, will be relevant. It is obvious, for instance, that if there is no power of restriction shown to exist in regard to proprietary rights *à fortiori* none would be expected to exist in respect of occupancy rights. And there are many cases, no doubt, in which the existence of a right to restrain the alienation of proprietary rights might lead to the inference that a similar right obtains regarding occupancy rights. Such might be the case, for instance, when the occupancy tenants are of the same tribe as the proprietors, and are shown to have settled with them in the village, but by some means to have lost their proprietary rights. But there are a vast variety of occupancy rights in this Province acquired in very various ways, and *per contra* to the instance given above, little inference could be drawn that a right to restrain the alienation of proprietary rights, which obtains among the proprietors of a village, who all belong to one tribe, obtains also among the hereditary tenants who belong to a different class, tribe and religion, and who have acquired their rights by sinking wells or improving land, or by some such means, in a village to which they have immigrated from other quarters. The latter case is probably quite as common as the former in some parts of the Province. In the Full Bench ruling referred to, *Karam Din v. Sharaf Din* ⁽¹⁾, one of the learned Judges, Walker, J., remarks that “when questions of inheritance and the like arise in respect of rights of occupancy tenants, such questions are not distinguishable *in kind* from those that arise in respect of proprietary rights to which ordinary agricultural custom is applicable.” These remarks were not adopted by the other learned Judges of that Bench, and we think they are not applicable at any rate to all the varied classes of occupancy rights which obtain in the Punjab. There

(1) 89, P. R., 1898.

is, for instance, one most material distinction between the two classes of rights. In addition to the plenary powers of alienation given by Section 53 of the Act, it is in the power of an occupancy tenant to annihilate the estate he holds by simple abstention from the performance of his obligations to his landlord. Under Section 38: "If a tenant having a right of occupancy fails "for more than one year without sufficient cause to cultivate his "tenancy either by himself or some other person and to arrange "for payment of the rent thereof as it falls due, the right of occupancy shall *be extinguished* from the end of that year." There is a very essential difference between a proprietary holding, the estate in which subsists and cannot be destroyed, though it may be transferred, and an estate, the very existence of which depends on the discharge of his obligations by the tenant to the landlord. It is a little difficult to see how any custom could grow up giving reversioners the power to restrict the transfer of such an estate, but we are not prepared to go so far as to say that this is impossible, but we think that it clearly lies upon the person asserting it to prove that such a custom exists, and we entirely concur in the view taken by Mr. Justice Roe, that it would not necessarily follow that if the power of alienating ancestral land was restricted, the power of alienating a tenancy would be equally so. In some cases no doubt the inference might be strong, in others it would be of the weakest. The remarks of Clark, C. J., and Chatterji, J., that a very strong inference would arise from the existence of custom in the one case that it existed also in the other appear to be directed to the class of cases enumerated by Mr. Justice Chatterji at page 313 as the typical cases of occupancy rights. In that very judgment, however, it is laid down by Clark, C. J., that "the "alienation is thus voidable either at the instance of the landlord "under Section 60 or by a collateral under the Customary Law, *if "the collateral is able to prove the custom,*" and we see no reason to suppose that this view taken by the Chief Judge, that the *onus* of proving the custom lay on the collateral, was not the view of the whole Bench. We hold, therefore, that when a collateral of an occupancy tenant seeks to restrain an alienation by that tenant, as to which the landlord has stood completely aside, it lies upon such collateral to prove that a custom exists under which he is entitled to do so, *i.e.*, the burden of proof is upon the collateral asserting the rights to restrain the alienation.

We, therefore, dismiss the appeal with costs, as we consider that the plaintiffs have quite failed to prove the existence of the alleged custom in this case.

Appeal dismissed.

No. 116.

Before Mr. Justice Robertson and Mr. Justice Maude.

HEM RAJ AND ANOTHER,—(DEFENDANTS),—

APPELLANTS,

Versus

SAHIBA AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 113 of 1899.

Custom—Adoption—Daughter's son—Hindu Jats of Hayatpur in the Garhshankar tahsil of Hoshiarpur District—Suit to obtain a declaration that an alleged adoption was invalid or had never taken place—Limitation from which period begins to run—Limitation Act, 1877, Schedule II, Article 118—Burden of proof.

On the 28th August 1884, one K. executed a deed of adoption in favor of his daughter's son. In 1894 after the death of K. his widow assented to mutation of names being effected in favor of the adopted son. In 1897 the plaintiffs, who are the male collaterals of K. instituted a suit to obtain a declaration that the alleged adoption was invalid, and that it never took place. The first Court found that the plaintiffs' claim was barred by limitation, that the defendant was adopted by K. and that the adoption was not invalid. The Divisional Judge reversed the decree of the first Court on the grounds that the suit was not barred, that the fact of the widow of K. allowing mutation in favor of the adopted son gave plaintiff a fresh cause of action, and that the defendant was not formally adopted, and that as a daughter's son he could not be adopted.

Held, that as the title of the adopted son to the property was created by the adoption, and not by any subsequent admission on the part of the widow of the adoptive father that the title existed, such an admission did not give plaintiff any fresh cause of action, and as the plaintiffs had knowledge of the adoption more than six years previous to the institution of the suit, their claim was barred under Article 118 of the second schedule to the Limitation Act of 1877.

Held, also, that although a presumption at the outset is against the power of an adoption of a daughter's son, in a case where evidence such as an entry in a *Wajib-ul-arz* or *Riwaj-i-am* or precedents are produced by the adopted son the burden of proof is shifted to the party denying the validity of such an adoption.

Found, upon the evidence that the defendant was formally adopted by K. and that his adoption was valid.

Parman v. Gian Singh ⁽¹⁾, *Natha Singh v. Sujan Singh* ⁽²⁾, and *Rolla v. Budha* ⁽³⁾ referred to.

Further appeal from the decree of S. Clifford, Esquire, Divisional Judge, Hoshiarpur Division, dated 9th December 1898.

Muhammad Shafi, for appellants.

Ram Chandra, for respondents.

⁽¹⁾ 94, P. R., 1893.

⁽²⁾ 34, P. R., 1899.

⁽³⁾ 50, P. R., 1893.

The judgment of the Court was delivered by

2nd Augt. 1901.

MAUDE, J.—The plaintiffs in this case are the male collaterals of one Kahna, and the defendants are the sons of Kahna's daughter and Kahna's widow. The prayer expressed in the plaint is for a declaratory decree "*ba ruh-i-tansikh tabniyat muddaila, numbar "ek, muarikha 28 August, san 1884."* The defence was that the suit was barred by limitation, that the adoption of his daughter's son by Kahna was valid and that the plaintiffs had assented to it. A registered deed of adoption was filed by the defendant, Hem Raj, dated August 28th, 1884. The suit was instituted in August 1897. The Additional District Judge found that the plaintiffs had knowledge of the execution of the deed, and that consequently a suit for a declaratory decree by cancellation of the deed was barred by limitation. He also found that the fact of the adoption was proved, and that it was valid. On appeal the learned Divisional Judge held that the suit was not time-barred, because in 1894 Kahna's widow had assented to mutation of names being effected in favour of Hem Raj, and that her action amounted to an alienation of Kahna's land in favour of Hem Raj. The further findings were that Hem Raj was not formally adopted, that as a daughter's son he could not be validly adopted, that the plaintiffs did not consent to the adoption, and that they did not know of the adoption deed. The claim was accordingly decreed.

With regard to the question of limitation, we are unable to follow the argument of the learned Divisional Judge. All that occurred at the time of mutation was that the widow admitted the genuineness of the deed of adoption, and that Hem Raj had been adopted by her deceased husband. The title of Hem Raj to the land (if any title exists) was created by the adoption, not by a subsequent admission on the part of the widow that the title existed. If then the alleged adoption became known to the plaintiffs more than six years before the suit was instituted, the suit is clearly barred under Article 118 of the 2nd Schedule of the Limitation Act. As to this point, we think that the Divisional Judge has under-estimated the weight to be attached to the evidence produced for the defence. The deed is a registered one, and was registered at the *tahsil*, and one of the witnesses to it was the *zaildar* of the plaintiffs' *zail*. This man was a Mussulman, whereas the parties are Hindu Jats, and if Kahna's intention had been to effect a secret transaction, it seems very unlikely that he would have invoked the aid of a witness of this character, not a co-religionist, and presumably one of the most influential men in the *ilaga*. There is nothing to show that the *zaildar* was in any

way interested in Kahna, or had any motive for furthering an illicit act on his part. In *Parman and others v. Gian Singh and others* ⁽¹⁾ the learned Judges observed that it might be conceded that the execution of a deed of adoption is one of the recognized methods of giving publicity to the fact of the adoption, and obviously, we think, a registered deed, witnessed by the *zaildar*, is a very cogent piece of evidence that publicity was intended. Then it has been established beyond doubt that Hem Raj was born in Kahna's house, and that Kahna made the arrangements for his marriage. There is also the evidence, which was believed by the Additional District Judge, who had the witnesses before him, that certain ceremonies were performed, in the way of festivities, at the time of the adoption, and that some of the plaintiffs and the father of the others were present. Taking all the evidence into account, we have no doubt that the plaintiffs had knowledge of the adoption more than six years previous to the institution of the suit, and consequently it is barred by limitation.

The finding on the foregoing point is sufficient to dispose of the appeal, but as the question of the fact and validity of the adoption has been discussed by both Courts, which have differed in their conclusions, we think it desirable to come to a decision on this question also. As happened on the hearing of the appeal in this Court, in the case of *Natha Singh v. Sujan Singh and others* ⁽²⁾, counsel openly contested the correctness of the Full Bench ruling in *Ralla and others v. Budha and others*, ⁽³⁾ and asked that the question of the imposition of the *onus probandi* might again be referred to a Full Bench. We think that this course is unnecessary so far as the disposal of this appeal is concerned, because, according to that ruling, the presumption against the validity of the adoption of a daughter's son is merely a general one to be made at the outset, irrespective of any evidence, such as *Wajib-ul-arz* or *Riwaj-i-am*, or precedents which may be forthcoming at a later stage of the case. The parties to the present suit are Hindu Jats of the Hoshiarpur District, and question 61 of their *Riwaj-i-am* runs thus—"If a man have no son or grandson or great-grandson in the male line, but has a daughter's son, can the grandfather adopt his daughter's son?" and the answer is—"In the presence of lineal male descendants no one can adopt, but if a man have no lineal male descendants, but has a daughter's son he can adopt him," and four instances

(1) 94, P. R., 1893. (2) 34, P. R., 1899.

(3) 50, P. R., 1893.

were recorded. This entry we hold to be quite sufficient to shift the burden of proof on to the party denying the validity of the adoption in the present case; indeed, we might go further and approve the more general proposition as regards all the Jats of the Hoshiarpur District, for the *Riwaj-i-am* applies to all alike throughout that area. And here we may remark that the learned Divisional Judge does not appear to have consulted the *Riwaj-i-am*, nor are there any indications as to the grounds on which he held that the adoption, if made, could not have been valid. He merely disposed of the question with the curt remark that “as a daughter’s son, he (Hem Raj) could not be validly adopted,” although the Additional District Judge had referred to certain precedents which had been produced to prove its validity, and had accepted them as relevant. As against those two instances, and the four mentioned in the *Riwaj-i-am*, not a single one to the contrary has been cited before us. Thus the evidence for the defence, coupled with the silence of the collaterals for a period of many years subsequent to the adoption, leaves no doubt in our minds that the adoption was valid. On all grounds, therefore, the plaintiffs’ suit fails. We accept the appeal and, reversing the order of the Divisional Court, dismiss the suit with costs throughout.

Appeal allowed.

No. 117.

Before Mr. Justice Robertson and Mr. Justice Maude.

APPELLATE SIDE. {

SHERAN AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

Versus

MUSSAMMAT SHARMAN,—(DEFENDANT),—RESPONDENT.

Civil Appeal No. 452 of 1899.

Custom—Inheritance—Channar Jats of tahsil Lodhran, District Mooltan—Exclusion of collaterals by sister of deceased—Muhammadan Law—Burden of proof—Riwaj-i-am—Punjab Laws Act, 1872, Section 5.

Held, that in a suit the parties to which were Channar Jats of tahsil Lodhran, District Mooltan, that the burden of proof lay, in the first instance, on the sister claiming in opposition to the collaterals, but that the rules of inheritance detailed in the *Riwaj-i-am* of the tahsil were sufficient to shift the burden of proof, and that the collaterals having failed to establish a custom by which the collaterals descended from the great-great-grandfather of the deceased owner were entitled to inherit landed property in preference to a sister, and that in the absence of a proved positive custom regulating their rights, rules of Muhammadan Law must be followed in accordance with the provisions of Section 5 of the Punjab Laws Act, 1872.

Mussammat Sardar Bibi v. Sayad Ali Shah ⁽¹⁾ and *Nasir-ud-din Shah v. Mussammat Lal Bibi* ⁽²⁾ cited.

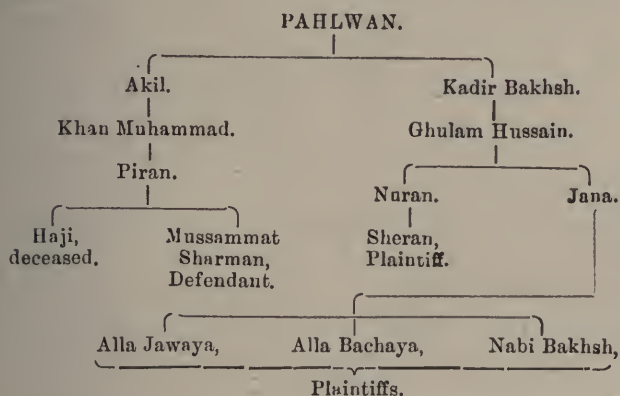
Further appeal from the decree of J. G. M. Rennie, Esquire, Divisional Judge, Mooltan Division, dated 27th January 1899.

Golak Nath, for appellants.

K. C. Chatterji, for respondent.

The judgment of the Court was delivered by

MAUDE, J.—The parties are Channar Jats of the Lodhran *tahsil* of the Mooltan District, and the pedigree-table is as follows :—



Thus, the plaintiffs are the great-great-grandsons, and the defendant Mussammat Sharman is the great-great-grand-daughter of Pahlwan, and the question for decision is, whether she, or the plaintiffs, are entitled to succeed to the ancestral estate of her deceased brother, Haji.

In her pleas, the defendant based her title, not only on a right of inheritance, but also on an alleged gift made by her deceased brother. The District Judge found that the gift was not proved, he also held that the *onus* of proving that she could succeed as heir, in preference to the collaterals in the male line, lay on the defendant, and that she had failed to establish any custom in her favour. The plaintiffs' claim was, therefore, decreed. In appeal, the learned Divisional Judge reversed that decision, and dismissed the plaintiffs' suit, on the ground that *primâ facie* they could not succeed, the *Riwaj-i-am* of the Lodhran *tahsil* being opposed to their claim, and also because mutation had been made in the defendant's favour so long ago as 1890, without challenge, until this suit was brought in 1898. Apparently, also, the Divisional Judge intended to find that the gift was proved, but his remarks on this point are vague and inconclusive.

⁽¹⁾ 4, P. R., 1888.

⁽²⁾ 83, P. R., 1888.

With regard to the alleged gift, we are clearly of opinion that there is no proof of it.

On the question of inheritance, for the plaintiffs it has been contended that under the general Customary Law of the Punjab governing agricultural communities, the collaterals in the male line, fifth in descent from the common ancestor, exclude sisters, but we are not prepared to assent to the wide proposition that such a general custom exists. Even assuming, however, that the initial *onus* were on the defendant to rebut the inference to be drawn from the existence of such a custom, the rules of inheritance, as detailed in the *Riwaj-i-am* of the Lodhran *tahsil*, are sufficient to shift the burden on to the plaintiffs. In Roc's Customary Law of the Mooltan District, the results of that officer's enquiries as regards the right of females to inherit are thus summarized: "as far as it is possible to speak of a general custom of the district, I should say that it is this: in the higher families, and in newly settled tracts, the succession of daughters is very general, but in the old villages they are excluded by near collaterals, but not by the more distant ones, unless they have married into another tribe." "Both by Muhammadans and Hindus the sisters are placed next after daughters, and succeed, or are excluded, according to the rules described."

When we turn to the questions put to, and the answers given by, the representatives of the various tribes, we find the Channar Jats of the Lodhran *tahsil* recorded as stating that when there are no sons, Muhammadan Law is followed. Then in answer to the question—"In the absence of sons, do sisters inherit? If so, what is their share with reference to daughters?" the reply is, "Muhammadan Law will be followed, and both daughters and sisters will take their shares." It was admitted, however, that no such case had ever yet occurred. The next question is—"If daughters are excluded by male collaterals, must the latter be within a particular degree of relationship?" and the answer is, that the collaterals must be descendants of the deceased's paternal grandfather. The only instance, however, cited, is the decision of the Divisional Judge in this very case. We do not say that these statements can be implicitly accepted as declaring the rules of inheritance actually obtaining among the tribes concerned, but their negative value is considerable, so far as the defendant is concerned, as showing that there is no general custom in the Mooltan District to which the plaintiffs can appeal as excluding her rights, for admittedly she is married to a member of the same tribe. The case then stands on the same footing as *Mussammat Sardar Bibi*

v. *Sayad Ali Shah* ⁽¹⁾ and *Nasir-ud-din Shah* v. *Mussammatal Bibi* and *Mussammatal Mawa Bibi* ⁽²⁾, and as no customary rule has been established, Muhammadan Law must govern our decision, in virtue of the provisions of Section 5 of the Punjab Laws Act, and if Muhammadan Law be applied it is admitted that the plaintiffs' suit must fail. The order of the Divisional Judge dismissing the suit is, therefore, affirmed, though not for the reasons recorded by him, and the appeal stands dismissed with costs throughout.

Appeal dismissed.

No. 118.

Before Mr. Justice Robertson.

KENNELLY,—(DEFENDANT),—PETITIONER,

Versus

ABDUL HAQ,—(PLAINTIFF),—RESPONDENT.

} REVISION SIDE.

Civil Revision No. 304 of 1901.

Master and servant—Monthly service—Consequence of leaving employment without giving sufficient notice—Right to wages.

Monthly servants are expected to give a month's notice of their intention to leave their service, therefore where a servant who was employed on a monthly engagement, and left after giving a written notice that he would leave in seven days, and would not work after the expiry of his notice, *held*, that the servant was not entitled to any pay for the portion of the month during which he left his service.

Ramji Maner v. Little ⁽³⁾ and *Dhume Behara v. Sevenoaks* ⁽⁴⁾ cited.
Petition for revision of the order of *Mian Nizam-ud-din, Judge, Small Cause Court, Lahore, dated 29th January 1901.*

Herbert, for petitioner.

Nabi Bakhsh, for respondent.

The judgment of the learned Judge was as follows:—

ROBERTSON, J.—The plaintiff in this case was engaged by Mrs. Kennelly of the Charing Cross Hotel, as her cook, on Rs. 80 a month. On the 14th of November 1900 he suddenly gave written notice that he would leave in seven days, and could not work after 24th November. The Judge, Small Cause Court, has assumed that because Mrs. Kennelly sent no written reply to this notice, that she accepted it, and agreed to its terms. This appears to be an assumption quite unwarranted by the facts. Mrs. Kennelly

⁽¹⁾ 4 P. R., 1888.

⁽²⁾ 89 P. R., 1888. Cf. also 116 P. R., 1892.

⁽³⁾ X Bom. H. C. R., 57.

⁽⁴⁾ I. L. R., XIII Calcutta, 83.

distinctly says that she did not agree to it. She was of course compelled by the exigencies of her situation to get another man of some kind to run her hotel, and the fact that she succeeded in getting one Mubammad Abdulla, whom by the way she had to dismiss in two months, as counsel for respondent states, is no proof that she accepted the resignation of, or acquiesced in the very short notice given by, Abdul Haq. Abdul Haq was admittedly a monthly servant, and, in the absence of a custom to the contrary, the natural inference would be that a month's notice of intention to leave should have been given by the plaintiff. The only rulings which appear to be relevant, which have been brought to my notice, are the judgment of the Bombay High Court, *Ramji Manor v. F. D. Little* ⁽¹⁾ and of the Calcutta High Court Division Bench in *Dhume Behara v. C. H. C. Sevenoaks* ⁽²⁾ which support the view that when a servant is employed on a monthly engagement, and leaves without due notice, that he is not entitled to any pay for the portion of the month during which he leaves, but only to pay up to the end of the preceding month. In those cases apparently no notice, or the very shortest notice, was given. The question here is, whether the notice given was sufficient and reasonable.

The plaintiff was cook and defendant manager of a large hotel. The period of the year was the very busiest. The plaintiff was head cook of a large cuisine. He suddenly announced his intention to leave in seven days, and quit work at the end of that period. Mrs. Kennelly says, and it can be easily believed, that she had great difficulty in getting any one to fill his place, and respondent's own counsel shows that the stop-gap was so unsatisfactory that he had to be dismissed in two months, and her business was in danger of suffering severely. Possibly, if an exhaustive enquiry were made, it could be found that there is a well-established custom in this country by which 15 days' notice is required on either side to terminate a monthly hiring, but the materials on the record do not justify me in laying this down as established. Fifteen days is given in Section 106 of the Transfer of Property Act, as the term of notice required to terminate a monthly tenancy, and 15 days was the notice required under an old Regulation, VII of 1819, to terminate a monthly hiring, which regulation has, however, been since repealed. I think, however, that it is quite clear that the notice given in this case was quite insufficient, and calculated to cause injury and embarrassment to defendant, and that under the circumstances, following the

(1) *X Bom. H. C. R.*, 57.

(2) *I. L. R.*, XIII *Calc.*, 80.

principles of the rulings quoted, the plaintiff was not entitled to any pay for the period in November during which he remained in Mrs. Kennelly's service. I accordingly set aside the judgment and decree of the Judge, Small Cause Court, and dismiss the claim with costs.

Application allowed.

No. 119.

Before Mr. Justice Robertson and Mr. Justice Maude.

WISHAN DAS AND OTHERS,—(PLAINTIFFS),—
APPELLANTS,

Versus

THAKAR DAS AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} APPELLATE SIDE.

Civil Appeal No. 1378 of 1897.

Hindu Law—Alienation—Alienation by Hindu widow—Right of collaterals to question such alienation in presence of daughters and their sons—Burden of proof—Collusion—Mahrotra Kkatris of Mooltan City.

Plaintiffs, the brother and nephews of one "P," sued for a declaration that a gift of a house formerly the property of P, made by his widow to the Sanatan Dharm Sabha for the good of her soul and that of her husband being without necessity was inoperative so far as it affected their reversionary rights. The defendant pleaded that by special custom she had the power to alienate the property at pleasure, that under an oral will she had authority to do so, that the gift being for spiritual benefit of her late husband was justified by Hindu Law, and that the plaintiffs were not the next reversioners under custom and that they could not sue in presence of daughters and their sons who would succeed after the widow. The first Court found all the points against the defendants and decreed the plaintiffs' claim. The Divisional Judge while agreeing with the first Court's finding on the first three points, disagreed with it on the fourth, holding that the plaintiffs upon whom the *onus* of proof lay have failed to prove that among non-agricultural Khatris of the Mooltan City the collaterals not members of a joint family succeeded to the self-acquired property of the deceased in preference to the daughters and their sons, and that, therefore, they as near collaterals had no *locus standi* in the presence of the daughters of the deceased and their sons, and cannot maintain a suit for a declaratory decree as sued for. On appeal by the plaintiffs to the Chief Court.

Held, that where the daughters and their sons are held to be the heirs of the deceased male proprietor, the collaterals cannot maintain their action unless they can prove that the abstention of the daughters and their sons who are heirs were in collusion with the widow, or did not sue for some improper and insufficient reasons.

Held also, that where the daughters or their sons agreed to the widow making the gift of a portion of her deceased husband's property to a re-

ligious institution for the good of her soul and that of her husband, their agreement was an act of filial piety against their own interest, and was not collusion in the sense in which collusion would give collaterals a right to sue to set aside the alienation.

Bona fide agreement in an act or recognition of the right of the person dealing with property to deal with it as has been done in the present case was not collusion, and does not give a more remote reversioner any right to sue for a declaratory decree that such act will not affect his rights.

Held further, that no rule of custom governing the parties (who were Mahrotra Khatri of Mooltan City) being established, the burden of proof being on plaintiffs, the personal law of the parties must furnish the rule under the provisions of Section 5 of the Punjab Laws Act, under which law collaterals are excluded by daughters and their sons.

Mussammat Jind Kaur v. Majlis Rai ⁽¹⁾, *Mussammat Lachobai v. Asa Nand* ⁽²⁾, *Ram Ditta v. Kishen Singh* ⁽³⁾, *Modari v. Malki* ⁽⁴⁾, *Harvans Singh v. Harnam Singh* ⁽⁵⁾, *Rani Anand Kaur v. The Court of Wards* ⁽⁶⁾, *Amin Chand v. Ghasita Mal* ⁽⁷⁾, *Nathu v. Behari* ⁽⁸⁾, *Lakhni Das v. Kishen Chand* ⁽⁹⁾, *Mussammat Melo v. Phulo Missar* ⁽¹⁰⁾, *Mussammat Pal Devi v. Fakir Chand* ⁽¹¹⁾, *Sham Ram v. Mussammat Hemibai* ⁽¹²⁾, and *Mussammat Sardar Bibi v. Sayad Ali Shah* ⁽¹³⁾ referred to.

Further appeal from the decree of T. J. Kennedy, Esquire, Divisional Judge, Mooltan Division, dated 30th August 1897.

Lal Chand, for appellants.

Madan Gopal, for respondents.

The facts of the case are fully set forth in the judgment of the Court which was delivered by

16th Augt. 1901.

ROBERTSON, J.—The property in dispute in this case is a house which belonged to one Pharaya Lal. Pharaya Lal's widow, Mussammat Chainibai, being at the time very ill with pneumonia, made a gift of a house in the town of Mooltan to the Sanatan Dharm Sabha, Mooltan. The deed of gift purports to have been executed in accordance with an oral will of Pharaya Lal, who was a Mahrotra Khatri of Mooltan City. A brother and nephews of Pharaya Lal sue the widow, who recovered from her illness, and the Sanatan Dharm Sabha, represented by its President, Secretary and Members, for a declaration that the gift, being without necessity, shall not affect their rights after the widow's death. The property is admittedly the self-acquired property of Pharaya Lal, and the defendant widow pleaded that according to

⁽¹⁾ 23 P. R., 1876.

⁽²⁾ 144 P. R., 1882.

⁽³⁾ 4 P. R., 1890.

⁽⁴⁾ I. L. R., VI All., 428.

⁽⁵⁾ 84 P. R., 1898, F. B.

⁽⁶⁾ I. L. R., VI Cal., 764.

⁽⁷⁾ 143 P. R., 1882.

⁽⁸⁾ 67 P. R., 1888.

⁽⁹⁾ 60 P. R., 1895.

⁽¹⁰⁾ 9 P. R., 1884.

⁽¹¹⁾ 108 P. R., 1888.

⁽¹²⁾ 73 P. R., 1896.

⁽¹³⁾ 4 P. R., 1888.

custom (*riwaj*) she was the full owner of it in the first plea, but in the last, it is urged that according to custom and Hindu Law, the daughter's son of Pharaya Lal is the heir to Pharaya Lal, and not the plaintiffs. The first Court framed four issues :—

1. Did Pharaya Lal make an oral will constituting Mussammat Chainabai as his full and sole heir ?
2. Is she full and absolute owner of the house according to any special custom ?
3. Was the gift for a necessary purpose, and is it authorized by law and custom ?
4. Are the plaintiffs not entitled to maintain the suit by reason of the presence of the daughters and daughters' sons of Pharaya Lal.

As regards the first three issues no further discussion is necessary. Findings against the defendant have been come to by both the lower Courts, and there is now no contest on these points.

The case now turns solely on the fourth issue. The first Court held that the plaintiffs were competent to maintain this suit, remarking that the question whether plaintiffs or their sons would succeed after the widow or the daughters and their sons would succeed is not to be determined in this suit. The daughters and their sons, it is to be noted, are not parties to this suit. The first Court held, therefore, that the plaintiffs having made out a *prima facie* right of succession and not having been proved not to be the next reversioners, had a right to sue. The Court further added that the daughters, and through them their sons, have secured the two houses which form the remainder of Pharaya Lal's property by means of another gift from the widow, and remarks that "thus they have obviously colluded with the defendants so far as the gift in suit is concerned."

The view, that in a case like this the reversioners can maintain a suit without absolutely proving their right to succeed in preference to daughters' sons, is supported by the judgments in *Mussammat Jind Kour and another v. Majlis Rai* ⁽¹⁾, *Mussammat Lachobai and others v. Asa Nand and others* ⁽²⁾, *Ram Ditta v. Kishen Singh and others* ⁽³⁾. In *Mussammat Lachobai and others v. Asa Nand and others* ⁽²⁾, the Judges (Smyth and Barkley JJ.) gave their opinion as follows :—"There appears, therefore, to be sufficient evidence of a custom excluding daughters' sons to

⁽¹⁾ 23 P. R., 1876.

⁽²⁾ 144 P. R., 1882.

⁽³⁾ 4 P. R., 1890.

“justify us in refusing to treat the daughter’s son as the nearest reversioner, and to hold that the plaintiffs’ suit should therefore not be entertained. It seems enough to decide that the plaintiff is not proved not to be the next reversioner without attempting to decide finally whether daughters’ sons are by custom excluded from the succession,” and this view was quoted with approval in *Ram Ditta v. Kishan Singh and others* ⁽¹⁾ in which Benton, J., said, there is “no reason why the question of custom should be finally decided on the present occasion, and the plaintiffs’ position is sufficiently well established to entitle them to the decree prayed for.” We do not wish to be understood as dissenting from the views quoted above regarding the grant of declaratory decrees in those cases. But we are of opinion that they cannot be applied to this case at the stage which it has now reached. The lower Appellate Court has considered it necessary to decide definitely whether the plaintiffs, or the daughters’ and daughters’ sons of Pharaya Lal will succeed to his property after the death of his widow, and he has come to a definite finding on that point, and has dismissed the claim in consequence of his finding. We do not consider that we should be now justified in going behind that finding. The Judge of the first Court also framed an issue on the point, and took a quantity of evidence, though he did not come to an absolute finding. As the case stands now, we think, therefore, that if it be held that the plaintiffs could not maintain their action in face of the fact that the daughters and daughters’ sons are the real heirs, it is now necessary to find definitely upon that latter issue.

We think that there can be no doubt that, if it be held established that the daughters and daughters’ sons are the next heirs, this suit cannot be maintained in the absence of some special cause, such as collusion, imbecility, absence, or the like on the part of the nearer heirs. This is indeed considered by the learned pleader for the appellants. The matter is discussed at length by four Judges of this Court, at that time constituting the entire Court, in an unpublished Full Bench Ruling, dated 4th July 1882.* The question referred to the Full Bench by Messrs. Smyth and Elsmie, JJ., was thus stated by them: “The question which we refer is, whether the plaintiffs, the nephews of Dhari Mal, are entitled to bring a suit against the defendant in view of the fact that the defendant, even if held not to be the adopted son of Dhari Mal, is, as the son of Dhari Mal’s daughter, entitled (as we must assume that he

(1) 4 P. R., 1890.

* *Barka Ram v. Jagat Ram and another*, C. A. No. 1818 of 1880, dated 4th July 1882, F. B.

"is for the purposes of this reference) to succeed to Dhari Mal's "estate as full proprietor on the death of his (defendant's) mother." The unanimous view of the Judges (Elsmie, Smyth, Rattigan, Barkley, JJ.) was that the suit was not maintainable, and that if it had been held maintainable, it should have been held to be one in which a Court should exercise its discretion in refusing to grant a declaratory decree. This was lately followed by Clark, Chief Judge, and Reid, Judge, in a case before them, No. 64 of 1896 unpublished, dated 26th March 1898. In the case dealt with by the Full Bench, the daughter's son was a party. A similar view was taken in *Madari and another v. Mulki and others* ⁽¹⁾, by the Allahabad High Court. This view is not really contravened by the ruling in *Harvans Singh v. Harnam Singh and others* ⁽²⁾, of this Court which dealt with a case under Customary Law. In that case it was laid down by the Full Bench that "plaintiff as a "remoter reversioner would be able to sue in the presence of a "nearer reversioner if the latter colluded with the alienor or was "a person with limited rights or had consented to or acquiesced "in the alienation, or refused to sue without sufficient cause, as "plaintiff's father has done in the present case." It was, therefore, held that he could sue in presence of his father, his father having improperly stood aside. It is urged by many, whose opinion is of weight, that the principle of allowing more remote reversioners to sue when nearer ones have stood by has been carried too far, but we accept the principle as laid down above. The matter is discussed by their Lordships of the Privy Council in *Rani Anand Kunwar v. the Court of Wards* ⁽³⁾ on behalf of Chandra Shekhar. It is clear from their Lordships' expression of opinion therein that the abstention of the nearest reversioner or heir, in order to enable a more remote one to sue, must be due to some improper cause connected with the act alleged to be wrongful and the view would not appear to be at all tenable that a *bonâ fide* recognition by the heir or next reversioner of the rights of the person whose act in connection with the property is questioned, to do that act, would give more remote reversioner the necessary *locus standi* to contest if any such view would lead to most undesirable results, and we do not find any authority for it. We are, therefore, of opinion on this part of the case that if the daughter and daughter's son be held to be the heirs of Pharaya Lal, the plaintiffs cannot maintain their action unless they can prove that the abstention of the daughters and daughters' sons who are heirs, which is quite a

(1) I. L. R., VI All., 428.

(2) 84 P. R., 1898, F. B.

(3) I. L. R., VI Cal., 764.

different thing from reversioners, were in collusion with the widow or did not sue for some improper and insufficient reasons.

There is no proof whatever of any "collusion" at all between the widow of Pharaya Lal and his daughters and their sons. The daughters and their husbands agreed to the widow making the gift to the Sanatan Dharam Sabha for the good of her soul and that of her husband no doubt, and as a meritorious act, and at the same time the widow gifted the remainder of her inheritance to the daughters. But seeing that the daughters were heirs to the whole property, their agreement was an act of filial piety against their own interest, and was not collusive in the sense in which collusion would give the plaintiffs a right to sue. *Bonâ fide* agreement in an act, or recognition of the right of the person dealing with property to deal with it as he has done, is not collusion, and does not give a more remote reversioner any right to sue for a declaratory decree that such act will not affect his rights. We now proceed to discuss the question whether the plaintiffs or the daughters' sons of Pharaya Lal are in fact his heirs. Both sides, it is true, speak vaguely of "custom" being in their favour—and we have to see whether any custom has been established. The parties are Khattris of a town, and there are multitudes of cases in which Khattris in towns have been held to be mainly governed by Hindu Law, some of which the learned counsel for the respondents recited to us. (*Ami Chand v. Ghasita Mal* ⁽¹⁾, *Nathu Mula v. Bihari* ⁽²⁾, *Lakhmi Das v. Kishen Chand* ⁽³⁾, *Mussammat Mulo v. Phulo Missar* ⁽⁴⁾, *Mussammat Pal Devi v. Fakir Chand* ⁽⁵⁾, *Sham Ram v. Mussammat Hemibai* ⁽⁶⁾, and C. A. No. 1422 of 1887, unpublished.) The property consists of houses which are the self-acquired property of the late Pharaya Lal. The plaintiffs produced a number of witnesses who quoted instances in which near male relatives took property to the exclusion of daughters and daughters' sons. In nearly all, if not all, these cases, however, the male relatives who succeeded were joint as regards the property in question with the deceased. They are, therefore, of no value as bearing on this case, and cannot be held to prove the existence of the custom set up. Nor can the instances quoted be held to carry the case much further. The same is true of the evidence for the defence, and their instances also. The oral evidence on neither side is of any real value, and the instances prove next to nothing. We must, therefore, hold that no rule of custom governing the parties has been established in this case, and following the principle laid

⁽¹⁾ 143 P. R., 1882.

⁽²⁾ 67 P. R., 1888.

⁽³⁾ 9 P. R., 1884.

⁽⁴⁾ 108 P. R., 1888.

⁽⁵⁾ 60 P. R., 1895.

⁽⁶⁾ 73 P. R., 1896.

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The references are to the Nos. given to the cases in the "Record."

No.

CRIMINAL PROCEDURE CODE, 1898—*contd.*

"In modification of Notification No. 1672A, dated the 20th of November 1900, and under Section 14 of the Criminal Procedure Code (Act V of 1898), the Honorable the Lieutenant-Governor is pleased to appoint and hereby does appoint Mr. J. G. M. Rennie, Divisional Judge, who has been posted temporarily to Rawalpindi, a Special Magistrate of the 1st class for a term of three months with power to try all such cases as may be instituted in his Court on the complaint of the Commissary-General of the Punjab Command, or of any other Officer of the Commissariat Department, or having been already instituted on such complaint in any other Court may be transferred to his Court, and under Section 50 of the said Code the Honorable the Lieutenant-Governor invests Mr. J. G. M. Rennie with power to try as such Magistrate all offences not punishable with death."—Had no jurisdiction or authority to try him, as Section 14 of the Criminal Procedure Code did not empower the Local Government to confer on any Magistrate jurisdiction over an area of a larger extent than a district, and that inasmuch as no local area was specified in the Notification, Mr. Rennie had no jurisdiction to try the case.

The point referred for the opinion of the Full Bench was—

Had Mr. J. G. M. Rennie jurisdiction to try the petitioner on a charge of misappropriation under Section 409 of the Penal Code, the offence being alleged to have been committed at Kai?

Held, by the Full Bench (Reid and Maude, JJ., dissenting) that Mr. Rennie had been invested with jurisdiction to try the case.

Per Clark, C. J., Robertson and Harris, JJ., that the Notification conferred jurisdiction throughout the Punjab by necessary implication, and that Mr. Rennie had jurisdiction to try the case.

Per Chatterji, J., that Mr. Rennie's appointment was not invalid on the ground that no local area was mentioned in the Notification which was capable of being interpreted to confer local jurisdiction in the district of Rawalpindi, and that Kai (that place where the offence was committed) was beyond his local jurisdiction, but that this did not involve the consequence that his proceedings were void for want of jurisdiction in the true sense of the word.

Per Reid and Maude, JJ., that the Notification appointing Mr. Rennie a Special Magistrate was radically defective by reason of the omission to define an area of jurisdiction, and that his proceedings were, therefore, null and void. LAKHMI CHAND *v.* THE EMPEROR ...

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See *Recognizance to keep peace.*

SECTION 110.

Security for good behaviour—Jurisdiction of Magistrate to require from a person not residing within his jurisdiction.—Held, that a Magistrate has no jurisdiction to proceed against a person under Section 110 of the Code of Criminal Procedure, and requires security for good behaviour when that person is not residing within the limits of his jurisdiction.

Ketaboi v. Queen-Empress (I. L. R., XXVII Cal., 993), followed.
CROWN v. KALU 12

SECTION 118.

Security for good behaviour—Amount of security—Consideration in fixing.—The petitioner was committed to jail in default of furnishing his bond in Rs 500, with two sureties, who should be respectable landowners, to be of good behaviour for three years.

Held, that in fixing the amount of security the station of life of the person concerned should be considered, and a fair chance of complying with the required conditions afforded, and that such a condition as that the sureties should be respectable landowners is obviously opposed to justice. The object of Chapter VIII of the Code of Criminal Procedure is not to fill the jails with persons against whom convictions of offences punishable under the Penal Code cannot be obtained, but to ensure good conduct out of jail.

Queen-Empress v. Razu Ali (I. L. R., XXIII All., 80), Queen-Empress v. Ramu (I. L. R., XVI Bom., 372), and The Empress v. Dedar Sircar (I. L. R., II Cal., 384), cited. WASAYA v. THE EMPEROR ... 28

SECTION 181 (4).

Penal Code, Section 3—Jurisdiction—British India Courts—Foreign subjects—Offence of kidnapping committed in Foreign Territory.—Where a foreign subject who had enticed away a girl from the protection of her husband in a Foreign State, and when conveying her by rail to another Foreign State, was found and arrested at a Railway Station in British territory, was tried and convicted of kidnapping under Section 363 of the Indian Penal Code by a British Court.

Held, that the act of kidnapping not being a continuing offence was complete outside British India, and that the accused not being amenable to the British Courts at the time of committing the offence, Section 181 (4) of the Criminal Procedure Code, 1898, did not give jurisdiction to the British Courts, no consequence having ensued in British India within the meaning of Section 179, and no offence having been committed in British territory.

The references are to the Nos. given to the cases in the "Record."

No.

CRIMINAL PROCEDURE CODE—*contd.*

Reg v. Pirtai (X Bom. H. C. R., 356), *Roda and others v. Empress* (30 P. R., 1889, Cr.), and *Ibrahim and others v. Queen-Empress* (7 P. R., 1894, Cr.) referred to. JAIMAL SINGH AND ANOTHER v. QUEEN-EMPRESS 1

SECTION 190.

Jurisdiction—Cognizance taken by a 2nd class Magistrate upon his own knowledge of a non-cognizable offence.—Held, that a 2nd class Magistrate cannot institute proceedings under Section 190 (1) (c) of the Code of Criminal Procedure upon his own knowledge or suspicion. The Punjab Government Notification No. 99, dated 3rd February 1883, only invests Magistrates of the 1st and 2nd classes with power to take cognizance of offences upon information and not on their own knowledge or suspicion. PIYARE LAL AND OTHERS v. THE EMPEROR OF INDIA 20

SECTION 195.

1. *And 476—Sanction to prosecute by a Court on its own motion—Complaint.*

See Sanction for prosecution, No. 2.

2. *Sanction to prosecute—Subordination of Courts—Power of District Magistrate to revoke sanction granted by Magistrate of the 1st class—Contradictory statements made before two different Courts not subordinate to each other—Power to give sanction—Penal Code, Section 193.—Held*, that for the purposes of Section 195, Criminal Procedure Code, a Magistrate of the 1st class is subordinate to the District Magistrate, who has jurisdiction to revoke a sanction granted by a 1st class Magistrate.

Held, also, that where the accused made contradictory statements in the Courts of a 1st class Magistrate and of an Honorary Magistrate, the sanction granted by the former was unauthorised, as the Court of the latter was not subordinate to his Court.

Semble.—The Court competent to grant sanction under such circumstances is the Court to which both the Courts in which the contradictory statements were made are subordinate.

Waryam v. Amir and others (10 P. R., 1894, Cr.) explained, and *Phina Singh v. The Empress* (25 P. R., 1889, Cr.), followed. SOBHA SINGH v. LAL CHAND 30

SECTION 233.

And Sections 234, 239 and 537—Distinct offences—Effect of joint trial for distinct offences in the same proceeding—Irregularity.—Where three accused, A., B. and C., were at one and the same trial tried for three dacoities committed during the course of a single day, and C. in addition with rescuing a prisoner from the custody of the police, and with the murder of a constable, and with taking part in the dacoity

The references are to the Nos. given to the cases in the "Record."

CRIMINAL PROCEDURE CODE, 1898—*contd.*

No.

in which the constable was murdered. *Held*, that as the charges were kept separate, and the opinions of the assessors were separately recorded on the charges which affected C. only, and those which affected all the prisoners, they were not prejudiced by the procedure adopted, and that that procedure did not occasion a failure of justice, the joint trial, though an irregularity, was cured by Section 537, and would not necessitate setting aside the trial and convictions.

Queen-Empress v. Kutti (I. L. R., XI Mad., 411). In the matter of *Iachmi Narain* (I. L. R., XIV Calc., 128), *Queen-Empress v. Chandi Singh* (I. L. R., XIV Calc., 395), *Queen-Empress v. Fakirapa* (I. L. R., XV Bom., 491), *Queen-Empress v. Mulua* (I. L. R., XIV All., 502), *Queen-Empress v. Chandra Bhuiya* (I. L. R., XX Calc., 537) and *Jung v. Queen-Empress* (5 P. R., 1900), referred to. MANUN v. QUEEN-EMPRESS 7

SECTION 250.

Compensation—Sanction to prosecute and award of compensation.
See Compensation in Criminal Cases.

SECTION 339.

Pardon—Withdrawal of pardon—Authority of committing Magistrate to withdraw pardon legally tendered by a District Magistrate.

See Pardon.

SECTION 395.

1. *Whipping—Sentence of imprisonment in lieu of whipping—Powers of Magistrate.—Held*, that a Magistrate cannot revise his order under Section 395 (1) of the Code of Criminal Procedure and pass a sentence of imprisonment in lieu of whipping, when the prisoner is found to be unfit to undergo such sentence, if the aggregate of such substituted term, together with the original term awarded by him, is in excess of the maximum which he was competent to inflict.

Queen-Empress v. Ram Baran Singh (I. L. R., XXI All., 25), followed. CROWN v. BARKAT ALI 11

2. *Sentence of imprisonment in lieu of whipping—Power of District Magistrate to revise the sentence of whipping passed by 1st class Magistrate of his district.—Held*, that the words "the Court which passed the sentence" in Section 395 of the Code of Criminal Procedure do not mean the same officer who inflicted the punishment of whipping originally, and that in the absence of the officer who passed the original sentence, the District Magistrate can be held to be the Court which passed the sentence."

The Empress v. Chetu (10 P. R., 1889, Cr.) referred to. CHHAJJU v. THE EMPEROR OF INDIA 33

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No.

CRIMINAL PROCEDURE CODE, 1898--*contd.*

SECTION 403 (3).

Re-trial of a person convicted of any offence causing consequence which together with such act constitute a different offence.—Accused was tried for voluntarily causing simple hurt and convicted. The person injured afterwards died from the result of the injuries inflicted upon him by the accused.

Held, that the District Magistrate might re-open the case, as the conviction for simple hurt was no bar to a commitment and subsequent trial for an offence either under Section 302 or 304 of the Penal Code in which the death of the deceased forms part of the offence. *QUEEN-EMPRESS v. SARBILAND* 3

SECTION 408.

And Section 35—Conviction at one trial for two offences—Four years' rigorous imprisonment for each offence, but the sentence ordered to run concurrently—Appeal from such sentence—Cause of appeal.

See *Criminal Procedure Code, 1898, Section 35.*

SECTION 437.

Discharge of accused—Farther enquiry—Notice to accused.—*Held*, that a further enquiry directed under Section 437, Criminal Procedure Code, does not in all cases mean a taking of additional evidence, but may be a re-hearing and re-consideration of the evidence already taken. But in cases where all the available evidence has been weighed, and good and sufficient reasons given for discharge such direction is improper.

Before such order for further enquiry is passed to the prejudice of an accused person it is ordinarily proper, though not legally necessary, that he should be called upon to show cause why such order should not be passed.

Semle.—The Magistrate directed to make the further enquiry may proceed to trial if he considers the evidence for the prosecution taken by him sufficient to sustain a charge.

Har Das Sanyal v. Saritulla (L. L. R., XV Cal., 608) and Jai Ram v. Mukhan Lal (8 P. R., 1900, Cr.) approved and followed. *DULLA AND OTHERS v. QUEEN-EMPRESS* 2

SECTION 488.

Maintenance—Husband having a second wife.—*Held*, that mere existence of a co-wife with whom the complainant had quarrels or want of affection for her or greater affection for the co-wife on the part of the husband are not sufficient grounds within the meaning of clause (3) of Section 488 of the Code of Criminal Procedure, 1895, for separate maintenance. *GANDA SINGH v. MUSSAMMAT ATMA DEVI* 14

The references are to the Nos. given to the cases in the "Record."

No.

CRIMINAL PROCEDURE CODE, 1898—concl'd.

SECTION 526.

Personal inspection of encroachment—Disqualification of Magistrate to try case.—Held, that a personal inspection by a Magistrate of the locality to test the correctness of the evidence and plans which may have been filed in a case which he is trying does not disqualify him from hearing and deciding it.

Queen-Empress v. Manikam (I. L. R., XIX Mad., 263), distinguished. In re *Lalji and others* (I. L. R., XIX All., 302), followed. CROWN v. HARSA SINGH 13

D.

DACOITY.

Dacoity—Abetment of—Penal Code, Sections 109, 395 and 397.—Where the abetment of dacoity charged consisted of pointing out to the dacoits the house to be robbed or of active participation in planning the dacoity and in taking charge of camels, used by some of the party, whilst the offence was being committed, the abettors should be charged and punished under Sections 395 of the Penal Code without any reference to Section 397, which is applicable only to those who actually commit a dacoity in which one of the acts specified therein is done.

Queen-Empress v. Mahabir Tiwari (I. L. R., XXI All., 263), and *Queen-Empress v. Unrao Singh* (I. L. R., XVI All., 437) followed. CHATAR SINGH AND OTHERS v. THE EMPEROR OF INDIA 15

DYING DECLARATION.

Dying Declaration—On what charges admissible—Admissibility of dying declaration where the death of another person is the subject of the charge—Evidence Act, 1872, Section 32 (1).—A dying declaration is admissible only where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration; and the statement of a deceased person (who did not himself charge the accused with having wounded him) to the effect that another person who had died was stabbed by the accused, is inadmissible under the provisions of Section 32 (1) of the Evidence Act.

King v. Mead (2 B. and C., 605) and *Regina v. Hind* (8 Cox., 300), followed. FAKIR v. THE EMPRESS 17

E.

EVIDENCE ACT, 1872.

SECTION 30.

Confession of co-accused—Joint trial.—Held, that a prisoner who had escaped from custody during trial, but before charge, and has been tried separately after re-arrest, cannot be said to have been tried jointly with one whose trial, from a stage prior to the charge, was separate, by reason of the escape from custody, and that the confession of the co-accused, who was first tried, was inadmissible against the prisoner, the trial not having been joint. HASSAN alias KAHN v. THE EMPEROR... 29

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EVIDENCE ACT, 1872—concl'd.

SECTION 32.

Dying declaration—On what charges admissible—Admissibility of dying declaration when the death of another person is the subject of the charge.

See *Dying Declaration*.

EXCISE ACT, 1896.

SECTION 3 (1) (i).

Spirit—Joint possession of father and son—Mixture of spirit and lahan.—In a case where 1 ser 11½ chittacks of liquor, being a mixture of spirit and lahan, was found in the house of the accused, in which house his son also resided, and where it was impossible to say how much lahan was mixed with the spirit owing to an accident in distillation. Held, that the accused had rightly been convicted by the Magistrate. In the absence of proof of a joint possession, the possession must be deemed to be that of the accused, the owner of the house, the presence of a son making no difference, as it was not proved that the son had joined in the purchase, or that the liquor had been held jointly with him, and that the whole of the liquor was country spirit within the definition of Section 3 (1) (i) of the Excise Act, the fact of lahan being mixed with it making no difference, as the whole was liquor containing alcohol obtained by distillation.

Queen-Empress v. Salaru (13 P. R., 1897, Cr.) followed. QUEEN-EMPRESS v. WAZIR SINGH 10

SECTION 36.

And Sections 45 and 57—Court taking cognizance of the offence of working an illicit still on a police chalan—Absence of complaint or report by Collector or Excise Officer.—Held, that a Magistrate can take cognizance of the offence of working an illicit still on the report or chalan of a Deputy Inspector of Police, who is an Excise Officer under Punjab Government Notification No. 735½, dated 26th March 1885, which Notification under Section 2 (2) of the Excise Act of 1896 is still in force, the police chalan being under Section 190 (6) of the Code of Criminal Procedure; a police report of facts constituting an offence.

Queen-Empress v. Chet Singh (22 P. R., 1900, Cr.), *Chatra v. Queen-Empress* (15 P. R., 1887, Cr.) and *Dera Singh v. Queen-Empress* (4 P. R., 1893, Cr.), followed. *Pirag v. Queen-Empress* (9 P. R., 1897, Cr.) distinguished. QUEEN-EMPRESS v. SUNDAR SINGH AND OTHERS ... 8

FALSE EVIDENCE.

F.

Perjury—Contradictory statements by witness—Penal Code, Section 193.—Where the statements of an uninterested and ignorant witness were in main to the same effect and the contradiction was only in detail and were on the view as taken by the Session Judge it was

The references are to the Nos. given to the cases in the "Record."

No.

FALSE EVIDENCE—*concl'd.*

apparent that the latter statement was a reversion to the truth from an original false statement, *held*, that ordinarily it would be inadvisable to order a prosecution for perjury under such circumstances as it compels a witness to adhere to his original lie under penalty of a prosecution if he tells the truth.

Santa Singh v. Queen-Empress (3 P. R., 1899, Cr.) cited. DAD v.
THE EMPEROR 21

FORGERY.

Using as genuine a forged document—Punishment both for forging a document and for using it as genuine.

See Penal Code, Section 466.

FURTHER ENQUIRY.

Discharge of accused—Further enquiry—Notice to accused.

See Criminal Procedure Code, 1898, Section 437.

G.

GOOD BEHAVIOUR—SECURITY FOR.

See Criminal Procedure Code, Section 110.

GRIEVOUS HURT.

1. *Separate sentences for rioting and grievous hurt.*

See Penal Code, Section 71.

2. *"Causes grievous hurt," meaning of.*

See Penal Code, Section 397.

3. *Robbery—Commission of grievous hurt in the course of a robbery—Penal Code, Sections 394 and 397.—Held*, that the offence of voluntarily causing hurt of either description in committing or attempting to commit robbery is punishable under Section 394 of the Penal Code, Section 397 being merely a rider to Section 394, with reference to cases in which the hurt committed is grievous. *Queen-Empress v. Mahabir Tiwari* (I. L. R., XXI All., 263) followed. CROWN v. MONA alias KOHARA 16

H.

HOUSE TRESPASS.

See Penal Code, Section 457.

I.

IRREGULARITY.

Effect of Joint trial for distinct offences in the same proceeding.

See Criminal Procedure Code, Section 233.

The references are to the Nos. given to the cases in the "Record."

No.

J.

JURISDICTION.

1. *Jurisdiction of Special Magistrate appointed under the provision of Section 14 of the Code of Criminal Procedure—Meaning of local area—Effect of omission to define area in the Notification.*

See *Criminal Procedure Code, 1898, Section 14.*

2. *Conviction at one trial for two offences—Four years' rigorous imprisonment for each offence, but the sentences ordered to run concurrently—Appeal from such sentences—Course of appeal.*

See *Criminal Procedure Code, 1898, Section 35.*

3. *Security for good behaviour—Jurisdiction of Magistrate to require from a person not residing within his jurisdiction.*

See *Criminal Procedure Code, 1898, Section 110.*

4. *Jurisdiction of British Indian Courts—Foreign subjects—Offence of kidnapping committed in Foreign Territory.*

See *Criminal Procedure Code, 1898, Section 181 (4).*

K.

KIDNAPPING.

Offence of kidnapping committed in Foreign Territory—Foreign subjects—British Indian Courts—Jurisdiction.

See *Criminal Procedure Code, 1898, Section 181 (4).*

L.

LOCAL AREA.

Meaning of—Jurisdiction of Special Magistrate appointed under the provisions of Section 14 of the Code of Criminal Procedure, 1898—Effect of omission to define area in the Notification.

See *Criminal Procedure Code, 1898, Section 14.*

M.

MAGISTRATE.

Personal inspection of encroachment—Disqualification of Magistrate to try case.

See *Criminal Procedure Code, 1898, Section 526.*

MAINTENANCE.

See *Criminal Procedure Code, 1898, Section 488.*

MUNICIPAL COMMITTEE.

Building a house without receiving any order from the Municipal Committee after six weeks of the receipt of a valid notice under sub-section (1) of Section 92 of the Punjab Municipal Act.

See *Punjab Municipal Act, 1891, Section 92.*

The references are to the Nos. given to the cases in the "Record."

No.

P.

PARDON.

Pardon—Withdrawal of pardon—Authority of Committing Magistrate to withdraw pardon legally tendered by a District Magistrate—Criminal Procedure Code, 1898, Section 339.—Held, that a Magistrate of the 1st Class inquiring into an offence is not competent to withdraw a pardon tendered by a superior authority; the withdrawal should emanate from the authority which granted the pardon.

Queen-Empress v. Manick Chundra Sarkar (I. L. R., XXIV Cal., 492) followed. CROWN v. MANNA SINGH AND ANOTHER ...

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PENAL CODE.

SECTION 3.

See Criminal Procedure Code, 1898. Section 181 (4).

SECTION 59.

Transportation instead of imprisonment, in what cases awardable.—The District Magistrate, having convicted the prisoner for offences under Sections 376 and 366 of the Penal Code, sentenced him to rigorous imprisonment for seven and three years and converted the two sentences into one of transportation for ten years under Section 59 of the Penal Code.

Held, that the general sentence of transportation was illegal. To bring Section 59 of the Penal Code into operation the punishment awarded in each offence alone must be not less than seven years' imprisonment.

Queen v. Shonaullah (5 W. R., 44, Cr.), Queen v. Gour Chunder Roy (8 W. R., 2, Cr.), and The Crown v. Sunda (63 P. R., 1866, Cr.), cited. SALAR BAKHSR v. THE EMPEROR ...

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SECTION 71.

And Sections 147, 149 and 325—Rioting—Grievous hurt—Separate sentences—Offence made up of several offences.—Held, that separate sentences for the offence of rioting and grievous hurt cannot be legally imposed upon a member of an unlawful assembly where the offence of rioting was not itself complete until the grievous hurt was actually inflicted, that is to say where the causing of the hurt was itself the form of force or violence which constituted the offence of rioting. Similarly, separate sentences cannot be awarded where the first clause of Section 71 of the Penal Code applies, and the offence committed is made up of parts—any of which part is itself an offence, but they can be legally awarded where distinct offences not made up of parts are proved to have been committed by one member of an unlawful assembly in prosecution of the common object of that assembly, or where the members of it know that such offences were likely to be committed in prosecution of that object.

Nilmony Poddar and others v. Queen-Empress (I. L. R., XVI Cal., 442) referred to. BHAGWAN SINGH AND OTHERS v. QUEEN-EMPRESS ...

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The references are to the Nos. given to the cases in the "Record."

No.

PENAL CODE—*contd.*

SECTION 80:

And Sections 99 and 101—Public servant in the execution of his duty as such—Arrest with sufficient authority—Assault on public servant making arrest—Right of private defence.—Held, that the accused, who was a public servant acting in the execution of his duty and who had had his conveyance stopped by a number of camel drivers whose camels were trespassing on the canal banks belonging to Government, and from whose custody a prisoner who had been legally arrested was either forcibly rescued or enabled to escape through the action of the accused and who had good reason to apprehend personal violence and who thereupon discharged his gun either accidentally, or to secure his own safety fired without taking careful aim at his assailants, and in doing so wounded one of them, is entitled to an acquittal. In the one case there would be no offence at all, and in the other the accused could come within the purview of Section 101 of the Penal Code. Held, also, that charges should be drawn up only with reference to the offence disclosed, and that it is not proper for a Magistrate to consider whether the framing of a certain charge will or will not render committal to the Sessions Court necessary. Held, further, that convictions can only be based on evidence actually before the Court, and cannot be supported by consideration of what it is believed witnesses could have stated or ought to have testified to. MUKERJI v. QUEEN-EMPRESS ...

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SECTION 99.

See Penal Code, Section 80.

SECTION 101.

See Section 80.

SECTION 109.

Abetment of dacoity.

See Dacoity.

SECTION 147.

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SECTION 149.

See Penal Code, Section 71.

SECTION 193.

1. *Sanction to prosecute—Contradictory statements made before two different Courts not subordinate to each other—Power to give sanction. See Criminal Procedure Code, 1898, Section 195.*

2. *Contradictory statements by witness—Perjury.*

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SECTION 325.

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SECTION 394.

Commission of grievous hurt in the course of a robbery.

See *Grievous Hurt, No. 3.*

SECTION 395.

Abetment of dacoity.

See *Dacoity.*

SECTION 397.

1. *Abetment of dacoity.*

See *Dacoity.*

2. *Commission of grievous hurt in the course of a robbery.*

See *Grievous Hurt, No. 3.*

3. "*Causes grievous hurt,*" meaning of.—A. fractured one of the arms of B. by striking one or two blows with a stick and thereby causing B. to fall to the ground, his object being to steal the pony on which B. was riding. After B. had fallen to the ground A. attempted to mount, and ride off, on the pony, and was only prevented from doing so by the girth of the pony's saddle breaking. *Held*, that whether the fracture of the arm was caused by a blow or the fall to the ground, inasmuch as the appellant caused the fracture by an act done in furtherance of his intention to steal the pony, and that act was in itself an offence, Section 397 of the Penal Code was applicable. It is immaterial whether the hurt which he intended to cause or knew himself to be likely to cause was or was not grievous hurt. Hurt, amounting to grievous hurt, was caused by an act, in itself an offence, done in furtherance of the intention to rob and at the time of committing robbery.

HARNAMAN v. QUEEN-EMPRESS 6

SECTION 406.

Criminal breach of trust by banker—Refusal to pay the money due to customer on account of losses sustained in business.—Held, that where the relation between the parties was that of banker and customer, which is in law that of debtor and creditor, the monies due to the customer were due simply as debts, and were fully at the disposal of the banker, and the latter in using them for his own purposes committed no breach of trust in a criminal sense.

Chandu v. Chanda Mal and another (95, P. R., 1885), cited. RAUSHAN RAI AND OTHERS v. THE EMPEROR 32

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No.

PENAL CODE—concl'd.

SECTION 457.

And Section 498—House trespass by night—Intention—Charge—False statement in charge in order to hide the real offence.—Where a charge is made of an offence under Section 457 with intent to commit theft, and the Court finds that such statement was made to hide the real offence which was one under Section 498, it should be very chary of convicting, especially if the prosecution had not alleged an offence of that nature and the accused has had no fair chance of meeting such a charge.—Sarwan v. The Empress (41, P. R., 1882, Cr.), cited. MANGAL SINGH v. THE EMPEROR

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SECTION 466.

And Section 471—Forgery—Using as genuine a forged document—Punishment both for forging a document and for using it as genuine.—Held, that the conviction, under Section 471 of the Penal Code of a person convicted in respect of the same document under Section 466 cannot stand. It is immaterial that the latter conviction is under Section 109 and Section 466, not under Section 466 alone, and an abettor of forgery cannot be punished under both sections any more than the forger can be so punished. He may be punished as if he were the forger.

Queen-Empress v. Umrao Singh (I. L. R., XXIII All., 84), cited. MOKAD LAL v. THE EMPEROR

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SECTION 471.

See Penal Code, Section 466.

SECTION 498.

See Penal Code, Section 457.

PERJURY.

See False Evidence.

POSSESSION.

Spirit—Joint possession of father and son.

See Excise Act, 1896, Section 3.

PRIVATE DEFENCE, RIGHT OF.

See Penal Code, Section 80.

PUNJAB MUNICIPAL ACT, 1891.

SECTION 92.

1. Building a house without receiving any order from the Municipal Committee—Notice under sub-section (1) of Section 92.—Held, that where a Municipal Committee failed to pass any order within six weeks after the receipt of a valid notice under sub-section (1) of Section 92 of the Punjab Municipal Act, the accused was warranted under sub-section (5) of that section to build his house, and must be deemed to have obtained the necessary sanction. AYA RAM v. QUEEN-EMPRESS

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No.

R.

RECOGNIZANCE TO KEEP PEACE.

Criminal Procedure Code, 1898, Section 106—Recognizance to keep peace—Stage of proceedings of which order should be passed.—A second Class Magistrate found the accused guilty of assault and sentenced them to a fine of Rs. 10 each, or simple imprisonment for one month, provided that the sentence should not be carried out in the event of the convicted persons being bound over to keep the peace by the District Magistrate to whom he referred the case. The District Magistrate thereupon ordered the accused to furnish security of Rs. 100 for a period of six months, and remitted the fine.

Held, that the order of the District Magistrate to furnish security for keeping the peace was bad in law, inasmuch as it is a condition precedent to such an order that it should be made at the time of passing sentence by the original Court or by the Magistrate of the District or on confirmation by the latter as an Appellate Court, of at least part of the sentence. CROWN v. NURA AND OTHERS 22

RE-TRIAL.

Re-trial of a person convicted of any offence causing consequence which together with such act constitute a different offence.

See *Criminal Procedure Code, 1898, Section 403 (3).*

RIOTING.

Separate sentences for rioting and grievous hurt.

See *Penal Code, Section 71.*

ROBBERY.

Commission of grievous hurt in the course of a robbery.

See *Grievous Hurt.*

S.

SANCTION FOR PROSECUTION.

1. *Power of District Magistrate to revoke sanction granted by Magistrate of the 1st Class—Contradictory statements made before two different Courts not subordinate to each other—Power to give sanction.*

See *Criminal Procedure Code, 1898, Section 195.*

2. *Sanction to prosecute—Criminal Procedure Code, 1898, Sections 195, 476—Sanction by a Court upon its own motion—Complaint.*—Under the provisions of Section 195 of the Criminal Procedure Code a Court may either sanction the institution of criminal proceedings by a private individual or may itself prefer a complaint the procedure for preferring which is laid down in Section 476 of the Code; therefore where during the hearing of a Civil case the petitioner filed a certificate signed by a Civil Surgeon to prove his age, the Court believing the

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No.

SANCTION FOR PROSECUTION—*conold.*

certificate to have been tampered with recorded a sanction under Section 195 of the Criminal Procedure Code on its own motion, as it suspected that either the offence of forgery (Section 463) or that of using as genuine a forged document (Section 471), Indian Penal Code, had been committed.

Held, that the sanction was bad in law, as it had not been granted to a private prosecutor, nor had the procedure laid down in Section 476 been adopted.

Queen-Empress v. Rachappa and Irappa (I. L. R., XIII Bom., 109), cited. ATMA RAM v. THE EMPEROR

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SECURITY FOR GOOD BEHAVIOUR.

1. *Jurisdiction of Magistrate to require from a person not residing within his jurisdiction.*

See *Criminal Procedure Code*, 1898, Section 110.

2. *Amount of security—Consideration in fixing.*

See *Criminal Procedure Code*, 1898, Section 118.

SENTENCE.

1. *Sentence of imprisonment in lieu of whipping—Power of District Magistrate to revise the sentence of whipping passed by a 1st class Magistrate of his District.*

See *Criminal Procedure Code*, 1898, Section 395.

2. *Separate sentences for rioting and grievous hurt—Offence made up of several offences.*

See *Penal Code*, Section 71.

W.

WHIPPING.

Sentence of imprisonment in lieu of whipping—Powers of Magistrate.

See *Criminal Procedure Code*, Section 395.

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Chief Court of the Punjab.

CRIMINAL JUDGMENTS.

No. 1.

Before Mr. Justice Clark, Chief Judge, and Mr. Justice Harris.

JAIMAL SINGH AND ANOTHER, —PETITIONERS,

Versus

THE EMPRESS, —RESPONDENT.

} REVISION SIDE.

Criminal Revision No. 883 of 1900.

Criminal Procedure Code, 1898, Section 181 (4)— Penal Code, Section 3— Jurisdiction—British Indian Courts—Foreign subjects—Offence of kidnapping committed in Foreign Territory.

Where a foreign subject who had enticed away a girl from the protection of her husband in a Foreign State, and when conveying her by rail to another Foreign State was found and arrested at a Railway Station in British territory, was tried and convicted of kidnapping under Section 363 of the Indian Penal Code by a British Court.

Held, that the act of kidnapping not being a continuing offence was complete outside British India, and that the accused not being amenable to the British Courts at the time of committing the offence, Section 181 (4) of the Criminal Procedure Code, 1898, did not give jurisdiction to the British Courts, no consequence having ensued in British India within the meaning of Section 179, and no offence having been committed in British territory.

Reg v. Purnai ⁽¹⁾, *Roda and others v. Empress* ⁽²⁾ and *Ibrahim and others v. Queen-Empress* ⁽³⁾ referred to.

Petition for revision of the order of W. C. Renouf, Esquire, Sessions Judge, Ferozepore Division, dated 14th May 1900.

The judgment of the Court was delivered by

HARRIS, J.—The petitioners are subjects of the Native State of Faridkot. 22nd Octr. 1900.

It has been found that a girl under 16 years of age was enticed or taken away in the Faridkot State from the lawful guardianship of her husband, by the petitioners, and was found being conveyed by them by rail from that State to a station in the Native State of Bahawalpur, at the Railway Station of

⁽¹⁾ 10, Bom., H. C. R., 356.

⁽²⁾ 30, P. R., 1889, Cr.

⁽³⁾ 7, P. R., 1894, Cr.

Abohar in British territory. The petitioners were tried and convicted of kidnapping and sentenced under Section 363, Indian Penal Code, by a British Court.

The appeal was dismissed by the Sessions Judge, and on revision being applied for the question of jurisdiction is raised.

That question was raised both at the trial and in appeal before the Sessions Judge.

The Courts below were of opinion that Section 181 (4), Criminal Procedure Code, gave them jurisdiction.

The question arises whether, and how far Section 181, Criminal Procedure Code, is applicable to foreigners.

Section 181 (4) of the Criminal Procedure Code runs as follows:—

“The offence of kidnapping or abduction may be inquired into or tried by a Court within the local limits of whose jurisdiction the person kidnapped or abducted was kidnapped or abducted or was conveyed or concealed or detained.”

The Criminal Procedure Code (Section 1, Act V of 1898) extends ordinarily to British India only.

Section 2, Indian Penal Code, renders every person liable to punishment for an offence under that Code committed in British India. “Every person” necessarily include foreigners. Section 3, Indian Penal Code, provides for offences committed by any person outside British India, liable to be tried by any law passed by the Indian Legislature, *e.g.*, under the Extradition Act.

It appears to us clear that Section 3, Indian Penal Code, only applies to the case of a person who at the time of committing the offence charged was amenable to a British Court. (*Reg v. Pirtai* (1), *Roda and others v. Empress* (2), *Ibrahim and others v. Queen-Empress* (3) and *Mayne's Criminal Law of India*, p. 269).

In this case the act of kidnapping charged was complete outside British India, and no fresh offence was committed in British India. There appears to have been no concealment or detention at Abohar such as would justify a conviction under Section 363, Indian Penal Code. The girl seems to have been a willing party and the husband averse to prosecution. The

(1) 10, *Bom., H. C. R.*, 356.

(2) 30, *P. R.*, 1889, Cr.

(3) 7, *P. R.*, 1894, Cr.

words "was conveyed" in Section 181 (4), Criminal Procedure Code, do not import any separate or distinct offence where the offence of kidnapping was complete previous to such conveying.

No consequence ensued in British India such as would bring the case within Section 179, Criminal Procedure Code, the illustrations to that section showing the consequence contemplated to be some consequence "modifying or completing the act."

The act of kidnapping was complete in foreign territory.

Nor was the offence a continuing one within the meaning of Section 182, Criminal Procedure Code, as the offence had been committed before British territory was reached.

Thus no offence was committed in British India and the petitioners at the time of committing the offence of kidnapping were not amenable to the British Courts.

Had the petitioners committed an offence in British India they would have been triable by British Courts. A foreigner found in dishonest possession in British India of property stolen even by himself in a Native State is triable by a British Court for an offence under Section 411, Indian Penal Code. (*Jafir Ali v. Queen-Empress* (1).) But that result is due to the definition of stolen property in Section 410, Indian Penal Code, and to the operation of Section 2, Indian Penal Code, and not to Section 181 (3), Criminal Procedure Code.

We think that subject to the liability of a foreigner to be tried for an offence committed by him in British India, Section 181, Criminal Procedure Code, has no application to foreigners, the intention of the section being evidently to provide for the case of an offender proceeding from one local jurisdiction in British India to another in British India.

There is thus nothing in Section 181, Criminal Procedure Code, which contravenes the general rule of international law that no Court has jurisdiction over foreigners in respect of offences committed in a Foreign State. Neither the Sessions Judge nor his predecessor to whose judgment in a like case the Sessions Judge has referred, appears to have understood the scope of the section in question.

We quash the convictions as being without jurisdiction, and direct the release of Jaimal Singh and Bhan Singh, petitioners.

Revision allowed.

(1) 30, P. R., 1894, Cr.

No. 2.

Before Mr. Justice Clark, Chief Judge, and Mr. Justice Harris.

REVISION SIDE. }

DULLA AND OTHERS,—PETITIONERS,

Versus

THE EMPRESS,—RESPONDENT.

Criminal Revision No. 693 of 1900.

Discharge of accused—Further enquiry—Notice to accused—Criminal Procedure Code, 1898, Section 437.

Held, that a further enquiry directed under Section 437, Criminal Procedure Code, does not in all cases mean a taking of additional evidence, but may be a re-hearing and re-consideration of the evidence already taken. But in cases where all the available evidence has been weighed, and good and sufficient reasons given for discharge, such direction is improper.

Before such order for further enquiry is passed to the prejudice of an accused person it is ordinarily proper, though not legally necessary, that he should be called upon to show cause why such order should not be passed.

Semle: The Magistrate directed to make the further enquiry may proceed to trial if he considers the evidence for the prosecution taken by him sufficient to sustain a charge.

Har Das Sanjal v. Saritulla ⁽¹⁾ and *Jai Ram v. Mukhen Lal* ⁽²⁾, approved and followed.

Petition for revision of the order of T. Millar, Esquire, District Magistrate, Ferozepore, dated 27th March 1900.

Jaisbi Ram, for petitioners.

The judgment of the Court was delivered by

22nd Octr. 1900.

HARRIS, J.—This is a petition for revision of the order of the District Magistrate, Ferozepore, setting aside the order of a Magistrate discharging the petitioners in a warrant case and directing a re-hearing of the case by another Magistrate.

Under Section 437, Criminal Procedure Code, the District Magistrate may direct any Magistrate subordinate to him to make further inquiry into the case of any accused person who has been discharged.

It is rightly contended before us that under the definition in the present Criminal Procedure Code (Act V of 1898, Section 4 (k)) inquiry does not include trial.

We are not, however, disposed to accede to the further contention that even if on further enquiry the Magistrate should think the evidence sufficient to allow him to proceed to charge and try the accused he is not empowered to do so, but should

(1) 1 L. R., XV Cal., 608.

(2) 8, P. R., 1900, Cr.

refer the matter to this Court, which alone has power in such case to order a re-trial.

We can find no authority either in the Criminal Procedure Code or in the ruling cited (*in the matter of Hari Das Sanyal and others v. Saritulla* (1), the head-note in which is misleading on the point), for the above contention. There appears to us nothing in the Code showing the disability of the Magistrate making the further enquiry to proceed to trial on the evidence before him if he considers the evidence sufficient, though Section 437 provides that the *direction* of the superior Court is confined to ordering the further enquiry. We do not consider in the absence of specific enactment, that the legislature intended such a roundabout procedure as is suggested by the counsel for petitioners.

We have, however, found it unnecessary to definitely decide the above point as the order of the District Magistrate seems to us to be bad on the merits.

It is further urged that before passing an order the District Magistrate should have called upon the petitioner to show cause. The weight of authority is in favour of holding notice not to be legally necessary under Section 437, Criminal Procedure, though ordinarily it is proper to issue notice in such cases. That is also our opinion, but it is not necessary to discuss the point as we have heard the application on the merits. Though the second Magistrate dealing with the case had charged the petitioners previous to application to and stay of proceedings by this Court, we do not consider the delay in making the application can be held to be ground for non-interference with the District Magistrate's order.

Agreeing with the majority of the Court forming the Full Bench in *Hari Das Sanyal v. Saritulla* (1), we think that there are cases in which a further enquiry directed under Section 437, Criminal Procedure Code, may be a re-hearing and re-consideration of the evidence already taken, *e. g.*, where the order of discharge is manifestly perverse or foolish, and not in all cases a taking of additional evidence. But we are in full accord with the principle enunciated in *Jai Ram v. Mukhan Lal* (2), in which it was held that where a Magistrate has dealt at considerable length with the evidence on the record and has recorded what appear to be sound reasons, to interfere with his order of discharge would practically be the conversion of a finding of an acquittal into one of conviction.

(1) *I. L. R.*, XV *Calc.*, 608.

(2) 8, *P. R.*, 1900, Cr.

In this case we find the Magistrate gave good reasons for disbelieving the evidence for the prosecution. If, as in this case, the complainant produces false evidence and varies his own statements the natural and proper legal consequence is a disbelief of the evidence by the Magistrate, and if he finds no credible evidence of the accused's guilt the order of discharge must follow. The District Magistrate's order seems to us as if based upon the idea that as complainant had been physically injured some one should be found guilty. But the Magistrate's order discloses his belief that none of the present petitioners committed the offence for which they were chalanged or indeed was proved to have been present in the fight.

It is difficult to see what further effort the Magistrate could make to charge the petitioners. No additional evidence has been produced for the prosecution before the second Magistrate but that Magistrate would naturally have an impression on his mind that his District Magistrate's opinion was opposed to that of the first Magistrate, and so would proceed to charge and try on the same evidence as that found to be untrustworthy by the first Magistrate.

We think the first Magistrate's distrust of the evidence for the prosecution as disclosing the guilt of the petitioners was based upon good and sufficient reasons and that the case was not one in which further enquiry, or rather a re-hearing of the same evidence, should have been ordered under Section 437, Criminal Procedure Code.

We set aside the order of the District Magistrate, Ferozepore, dated 27th March 1900. The proceedings before the Magistrate subsequent to that order are consequently void, and we direct the release of the petitioners, Shamu, Dulla and Kehra, if in custody, so far as this prosecution is concerned.

Application allowed.

No. 3.

Before Mr. Justice Robertson.

THE CROWN

Versus

SARBILAND AND ANOTHER.—ACCUSED.

Criminal Revision No. 426 of 1900.

Criminal Procedure Code (Act V of 1898), Section 403 (3).—Re-trial of a person convicted of any offence causing consequences which together with such act constitute a different offence.

REVISION SIDE. {

Accused was tried for voluntarily causing simple hurt and convicted. The person injured afterwards died from the result of the injuries inflicted upon him by the accused.

Held, that the District Magistrate might re open the case as the conviction for simple hurt was no bar to a commitment and subsequent trial for an offence either under Section 302 or 304 of the Penal Code in which the death of the deceased forms part of the offence.

Case reported by C. E. F. Bunbury, Esquire, District Magistrate, Peshawar, on 3rd April 1900.

Harris, for respondent.

The facts of this case were as follows :

The accused, on conviction by Khan Taj Muhammad Khan, exercising the powers of a Magistrate of the 1st class, in the Peshawar District, were sentenced, by order, dated 28th February 1900, under Sections 324 and $\frac{100}{324}$ of the Indian Penal Code, to six months' rigorous imprisonment (including one month's solitary), with a fine of Rs. 20 or one month's further like imprisonment in default, and four months' rigorous imprisonment, with a fine of Rs. 10 or one month's further rigorous imprisonment, respectively.

The proceedings were forwarded for revision on the following grounds :—

The wounding of Mazmun, which forms the subject of this case, occurred on the 5th February 1900. The police chalaned the case, as against the two accused above-named under Section 307, Indian Penal Code. The Additional District Magistrate in his order, dated the 13th February 1900, expressed the opinion that the facts alleged against accused did not constitute the offence of "attempt to murder," and sent the *chalan* to the Sub-Divisional Magistrate for trial on a charge under Section 324, Indian Penal Code.

The Sub-Divisional Magistrate tried the case, and on the 28th February 1900 he convicted accused Sarbiland under Section 324, Indian Penal Code, and Taus under Section $\frac{100}{324}$, Indian Penal Code, and sentenced them to six months' and four months' rigorous imprisonment, respectively.

On the 3rd March 1900 complainant Mazmun died, and the *post-mortem* report shows that he died from the results of the injuries inflicted upon him by the accused on the 5th February last. Owing to Mazmun's death accused Sarbiland and Taus are liable to be tried on a charge of murder, but as they have already been convicted on the same facts of offences under

Sections 324 and $\frac{109}{324}$, Indian Penal Code, the case will be reported to the Chief Court with a recommendation that the convictions be quashed, and that the two accused be committed for trial on charges under Sections 302 and 304, Indian Penal Code.

This reference with the files of the case will be forwarded through the Sessions Court, for if the two accused have appealed to that Court from the convictions and sentences passed on them by the Magistrate on 28th February 1900, the Sessions Judge can himself order the committal of the accused under Section 423 (1) (b) (1), Criminal Procedure Code, on the appeal.

The case came before Mr. Justice Robertson, who passed the following order :—

4th August 1900.

ROBERTSON, J.—It was not necessary to make this reference, and I do not propose to pass the orders suggested. A trial for causing hurt, which clearly had occurred, and a trial for causing death, which has occurred in consequence of the injuries caused, but which has taken place after the trial and conviction for hurt is not a trial on the same facts. The death, which has occurred since, is a new fact of crucial importance. But the Criminal Procedure Code specifically provides for cases of this kind. Under Section 403 (3), this very contingency is mentioned and illustration (c) is almost exactly on all fours with the present case, “hurt” being substituted for “grievous hurt.”

It is, therefore, open to the District Magistrate to order the re-opening of the case. And if the Magistrate, before whom it goes, considers that there is ground for a committal under Section 302 or Section 304, the previous convictions for simple hurt is no bar to such commitment and subsequent trial; and should the trial result in a conviction, the convict can be punished under Section 304 or Section 302, or whatever section may be appropriate in which the death of the deceased forms part of the offence.

With these remarks the reference is returned through the Sessions Judge to the District Magistrate for disposal according to law.

Full Bench.

No. 4.

*Before Mr. Justice Clark, Chief Judge,**Mr. Justice Chatterji and Mr. Justice Maude.*

BHAGWAN SINGH AND OTHERS,—PETITIONERS,

Versus

THE EMPRESS OF INDIA,—RESPONDENT.

} REVISION SIDE.

Criminal Revision No. 740 of 1900.

Penal Code, Sections 71, 147, 149 and 325—Rioting—Grievous hurt—Separate sentences—Offence made up of several offences.

Held, that separate sentences for the offence of rioting and grievous hurt cannot be legally imposed upon a member of an unlawful assembly where the offence of rioting was not itself complete until the grievous hurt was actually inflicted, that is to say, where the causing of the hurt was itself the form of force or violence which constituted the offence of rioting.

Similarly, separate sentences cannot be awarded where the first clause of Section 71 of the Penal Code applies, and the offence committed is made up of parts—any of which part is itself an offence, but they can be legally awarded where distinct offences not made up of parts are proved to have been committed by one member of an unlawful assembly in prosecution of the common object of that assembly, or where the members of it knew that such offences were likely to be committed in prosecution of that object.

Nilmoy Poddar and others v. Queen-Empress ⁽¹⁾, referred to.

Petition for revision of the order of Rai Bahadur Lala Buta Mal, Sessions Judge, Lahore Division, dated 31st May 1900.

Ganpat Rai for petitioners.

The judgment of the learned Judges who constituted the Full Bench was delivered by

MAUDE, J.—This reference has arisen out of a case in which 23rd Nov. 1900. it was found that five persons had lain in wait armed with sticks in order to attack the complainant, and that one of those persons had caused grievous hurt to him by breaking his arm. Convicting all five accused persons, the Magistrate awarded the actual causer of the hurt separate sentences under Sections 147 and 325 of the Indian Penal Code, and the other four persons separate sentences under Section 147 and Section 325 read with Section 149. This order was upheld in appeal by the Sessions Judge.

⁽¹⁾ *I. L. R.*, XVI Cal., 442.

The question referred for the decision of the Full Bench was as follows : Can separate sentences under Section 147, Indian Penal Code, and under Section 325 be legally awarded to persons for the offences of rioting and of voluntarily causing grievous hurt, when such hurt has been caused not by those persons but by others who also committed the offence of rioting.

We are of opinion that no general answer to the question can be given which will equally apply to all cases which may arise. Where the offence of rioting has not been completed until the grievous hurt has been caused, or, in other words, where the causing of the grievous hurt is itself the form of force or violence which (with other circumstances) constitutes the offence of rioting, we are clearly of opinion that separate sentences cannot be legally imposed, and this would be the case not only as regards those persons who did not actually cause the hurt but also as regards the actual causer of it. But we are not prepared to go so far as to hold as a general proposition that separate sentences passed upon persons for the offences of rioting and grievous hurt are necessarily illegal where it is found that such persons individually did not commit any act amounting to voluntarily causing hurt, but were guilty of that offence under Section 149 of the Penal Code. That view appears to have been accepted by a Full Bench of the Calcutta High Court (Tottenham, J., dissenting) in the case of *Nilmony Poddar & others v. Queen-Empress* (1), and no doubt in many cases separate sentences would be illegal, but it seems to us quite possible that cases may occur in which after the offence of rioting has been fully established, owing to the use of force or violence, and all the members of the unlawful assembly have been rendered liable for that offence, one or more persons may proceed to further acts of violence such as causing grievous hurt or homicide, and we do not see why others who remain members of the unlawful assembly, during the later phases, may not also be held guilty of committing the subsequent offences in addition to the previously completed offence of rioting, and be punished separately for each offence. Each case, however, must be decided with reference to its own special facts, and it appears to us impossible to lay down any general rule. What has to be decided in each case is whether the first clause of Section 71 of the Penal Code applies or not if it applies, and the offence committed is made up of parts, any of which parts is itself an offence, then the offender "shall not be punished with the punishment of "more than one of such his offences, unless it be so expressly

(1) I. L. R., XVI Cal., 442.

“provided.” For example, if a member of an unlawful assembly pushes a man, then strikes him causing hurt, and then deals a heavier blow fracturing his arm, Section 71 would operate, and the offender could not be separately punished for rioting, assault, voluntarily causing simple hurt and causing grievous hurt, and similarly of course separate sentences could not be awarded to other members of the assembly found guilty of those offences in virtue of Section 149. But Section 149 of the Penal Code covers a wide area, and applies when any offence is committed by one member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of it know to be likely to be committed in prosecution of that object, and not only offences affecting the human body, but others such as mischief or theft might be committed, and where distinct offences not made up of parts are proved to have been committed, we see no reason why separate sentences may not be awarded whether the offences affect the human body or not. In practice, however, we consider that the most convenient course is for the Court to pass one sentence for the most serious offence of which the accused person is found guilty, provided that adequate punishment can be given to the offender for his share in the occurrence. In the case which has given rise to this reference, a 1st class Magistrate awarded two sentences, each of six months’ rigorous imprisonment under Sections 147 and 325, Indian Penal Code, a procedure which was quite unnecessary as a sentence of one year’s imprisonment could have been passed under either section.

No. 5.

Before Mr. Justice Robertson.

MUKERJI,—PETITIONER,

Versus

QUEEN-EMPRESS,—RESPONDENT.

} REVISION SIDE.

Criminal Revision No. 981 of 1900.

Indian Penal Code (Act XLV of 1860), Sections 80, 99 and 101—Public servant in the execution of his duty as such—Arrest with sufficient authority—Assault on public servant making arrest—Right of private defence.

Held, that the accused, who was a public servant acting in the execution of his duty and who had had his conveyance stopped by a number of camel drivers whose camels were trespassing on the canal banks belonging to Government, and from whose custody a prisoner who had been legally arrested was either forcibly rescued or enabled to escape through the action of the accused, and who had good reason to apprehend personal violence and who thereupon discharged his gun either accidentally, or to secure his own safety fired without taking careful aim at his assailants, and in

doing so wounded one of them, is entitled to an acquittal. In the one case there would be no offence at all, and in the other the accused could come within the purview of Section 101 of the Penal Code.

Held, also, that charges should be drawn up only with reference to the offence disclosed, and that it is not proper for a Magistrate to consider whether the framing of a certain charge will or will not render committal to the Sessions Court necessary.

Held, further, that convictions can only be based on evidence actually before the Court and cannot be supported by consideration of what it is believed witnesses could have stated or ought to have testified to.

Petition for revision of the order of H. Scott Smith, Esquire, Sessions Judge, Amritsar Division, dated 23rd July 1900.

Grey, S. P. Roy and K. P. Roy, for petitioner.

Government Advocate, for respondent.

The judgment of the learned Judge was as follows:—

5th Nov. 1900.

ROBERTSON, J.—In this case the accused on the one hand has applied to this Court for a revision of his conviction and sentence and the learned Government Advocate on the other hand has applied for an enhancement of sentence. Both applications have been admitted to a hearing.

Up to a certain point the facts are sufficiently clear.

The accused, a Mr. Mukerji, is a subordinate but gazetted Officer in the Canal Department. On the 28th March last he was driving in a tonga along the bank of the Bari Doab Canal near a village named Jethwal in the Amritsar District, with his wife and *ayah* sitting in the back of the tonga.

Mr. Mukerji while driving along saw a number of camels trespassing on the canal banks and grazing thereon. He caused them to be collected and driven forward; one of those in charge of the camels was then arrested by his order, named Muhammad Hassan, and placed in charge of his *syce*, apparently tied with a rope, for both Mr. Mukerji and the witnesses for the prosecution agree in saying so, though the *syce* now, evidently not wishing to commit himself, says he only held Muhammad Hassan by the hand. Accused, as is also proved by both sides, told Muhammad Hassan he would let him go if he would give his name. Muhammad Hassan gave an obviously false name, as he himself admits, and so was not released. Then a number of Biloch camel drivers came by to Mr. Mukerji's tonga, besought him to release Muhammad Hassan and their camels, but he refused unless true names were given. Now, up to this point there is no divergence, and it must not be forgotten that the statement made by Mr. Mukerji to

his officer, Mr. Eldridge, up to this point is entirely corroborated. It is desirable therefore here to pause and emphasize the fact that Mr. Mukerji was simply doing his duty, and that up to this point the position of the Biloches was that of persons who had undoubtedly offended against the law and already rendered themselves liable at least to pecuniary penalties.

The next undoubted fact in the drama is that Muhammad Hassan, the man who had been arrested, as the first Court puts it, "managed to escape." Khattar, the man who was afterwards shot, when lying in hospital himself distinctly said that he, Khattar, himself released Muhammad Hassan. That statement was clearly admissible in the accused's favour, but seems to have been ignored by both the lower Courts. We thus have the further fact, whether we believe Khattar's statement made before any idea of compromise had been started or not, that in consequence of the flurry and bustle caused by the action of the Biloch camel drivers, Muhammad Hassan, properly arrested by Mr. Mukerji in the due exercise of his duty, escaped.

Mr. Mukerji's account of what followed may be quite false, and we shall have to consider whether the evidence of the prosecution proves it to be so, but allowing for little possible colouring it is obviously in itself entirely likely, probable and credible. He says that his refusals to listen to the prayers of the Biloches caused them to become violent, that one struck at him with an axe, that he had the reins in one hand and his gun, usually kept in a rack in the tonga, in the other, and that it went off; no one was seen to be hit and he drove on. That an axe was in the hands of one of the Biloches is admitted, and the story that it was with Gulaba, of all of them, a little boy of 12, and that the *syce* was suffered to seize it, does not recommend itself to an ordinary intelligence. Some of the camel men also are said to have had sticks, as would also naturally be the case. The defence, allowing for a little hyperbole, amounts to this that Mukerji feared violence, first threatened to fire, and then as the Biloches would not let go his tonga and appeared to him about to attack him, Mukerji fired and without waiting to see the result, as the Biloches fell back on each side, as they naturally would, whipped up his pony and drove on. This is how his counsel puts it, this is clearly what was conveyed to Mr. Eldridge, and this is *prima facie* the most credible and probable account of the matter. But both the lower Courts have occupied themselves far too much in discussing probabilities and assumptions against the prisoner, and I will only make two other observations in regard to "probabilities" which appear to me imperatively called for by certain portions of the judgments of the lower Courts.

The Magistrate, an officer who at the time of trial had less than $2\frac{1}{2}$ years' service, disbelieves the story for the defence, partly because when he himself has been the subject of urgent petitions and has had a hand laid on his bridle he has always found a rap on the knuckles sufficient discouragement, and because in his opinion the Biloches would never have dared to go beyond impunity. Perhaps $2\frac{1}{2}$ years is an insufficient period of experience to justify the introduction of such conclusions into judicial decisions, and perhaps the Magistrate may find later that there is some difference between the case of a Deputy or Assistant Commissioner in his own district dealing with peaceable villagers and a Bengali Baboo dealing with truculent Biloch camel drivers who have already committed an offence for which he is calling them to book. Also he may learn that the very practice which he treats so lightly, has in itself resulted in many serious accidents including, it is understood only a few years ago, the death of a well known officer of long service. It is greatly to the credit of the Punjab peasant that he is, as a rule, docile and submissive to proper authority, but there are law-abiding citizens and law-breakers in every country, and we cannot safely generalize as to the probable conduct of the latter towards those whose powers are not extensive by the habitual conduct of the former towards those whose powers and authority are well known to be large. A similar assumption has been allowed to tell against the accused in the mind of the learned Sessions Judge who remarks: "I think it utterly improbable that a few Biloches would dare to attack a gazetted officer in the way described."

Possibly the extent of the violence may have been somewhat exaggerated by Mr. Mukerji's natural trepidation, but otherwise I am quite unable to accept the proposition. I will not fall into the error of trusting in any way to my own personal experience, but will keep strictly to the record.

I have only lately had before me a case in which an Honorary Magistrate, with his *chuprassies* beside him, sitting on his *chabutra* doing an official act, *i. e.*, registering a document, was attacked and beaten in the Montgomery District (Queen-Empress v. Murli, No. 211 Revision of 1900).

I have also actually on my table at this moment the file of a case (Queen-Empress v. Jagta and 3 others), appeal No. 912 of 1900, in which a European Police Officer, acting in the discharge of his duty, armed with a revolver and known to be so, and accompanied by a Deputy Inspector and a Police Sergeant, was the subject of a murderous attack for which several persons have been convicted;

and this occurred in the very next district to the one in which the case now under discussion occurred, and much about the same time. These are only two cases out of many which could be quoted. I am unable therefore to accept it as a fair assumption against an executive officer in Mr. Mukerji's position that "such divinity doth hedge a gazetted officer," that his story must be assumed to be false when he says that he feared, and had good reasons to fear, personal violence. Further it does not appear from the file that the Biloches were aware whether the accused was a "gazetted officer" or not.

Let us now, giving the accused the benefit of the only assumption proper to make, *à priori*, in a criminal charge, *i. e.*, that he is innocent until proved guilty, proceed to consider whether or not the extremely *à priori* improbable story of the prosecution is proved to be true or not.

That story amounts to this, that the Biloch camel drivers did nothing more than humbly entreat the accused, a member of a race utterly despised by such races as the Biloch camel men of the Marjalla, and believed by them to be by no means likely to possess qualities of extreme physical strength or courage, that the accused refused to listen to their entreaties, that somehow or other in some mysterious way the man under arrest, who had failed to effect his escape before, became able to do so without assistance during their entreaties. That the accused threatened to shoot if they did not desist, that they thereupon ran away, and then the accused got deliberately out of the tonga, fired first one shot which missed, and then went forward to get a more favourable position, fired again and shot his man. It is not necessary to discuss the truth of this story, for both the lower Courts have agreed that the story of the two shots is an untruth, as indeed it obviously is. The Biloches, who knew perfectly that they had been entirely in the wrong, and in the position of offenders suing for pardon up to the firing of the shot at any rate, were, on Sawan Singh's own showing, most reluctant to report the matter to the Police. Sawan Singh, lambardar, whose incredible story has been held to be full of falsehoods, although he was bound to do so, never reported the matter himself, and the Biloches were only too anxious to compromise, indeed did so, though this was not permitted by the Court who held the offence to be non-compoundable. Here I must remark that it is a Magistrate's duty to draw a charge in accordance with the offence disclosed, and not to consider such questions as whether he himself has or has not jurisdiction to try the offence, or whether a parti-

cular charge will or will not require a committal to the Sessions. In drawing a charge there is one consideration and one only to be entertained, and that is, what is the offence disclosed? The result has been that in this case the learned Sessions Judge has convicted the accused under Section 308, Indian Penal Code, for which the Magistrate was not competent to try him, and, as is admitted by the learned Government Advocate, this would necessitate under any circumstances that the case should be sent back for retrial, if this Court considered that the conviction should not be set aside.

The evidence on which the accused has been convicted is mainly that of Sawan Singh and two or three other villagers, for the first Court remarks that the Biloches having something to gain by compromise and none by conviction are not to be trusted, and "we must depend on Sawan Singh, &c., who have nothing to gain by compromise" are the words of the Magistrate. Sawan Singh is a witness quite unworthy of credit. His statement that he was present at all appears to me to be of extremely doubtful veracity. In fact he is in my opinion quite untruthful and unreliable. I have been also carefully through the evidence of each of the witnesses and the Police file, and though ordinarily loth to interfere with a concurrent finding of fact by two Courts, in this case those findings are so much based on assumptions, and in some cases clearly assumptions not justified by the facts, that I feel bound in this case to do so. I do not think that the evidence of the prosecution in favour of their account of the transaction justified the conviction of the accused, the evidence of whose witnesses again is at least fully as reliable as that of those for the prosecution on whom the *onus* lay; and who have failed to prove their case. There are, I may remark, many glaring discrepancies between the evidence of Sawan Singh and his co-villagers and that of the Biloches, *inter alia*, the statement of the latter in flat contradiction to that of the former, that when Khattar fell down and was placed under a tree and water fetched for him, *no one* but Biloches were present, and that *no* villagers appeared for an hour after the departure of the tonga. The first Court considered that the Biloches were not speaking truly in order to further a compromise which had been already rejected, but we must convict an accused on the evidence before us, and not on what we think the witnesses have left out, or might have said. No doubt it is often extremely annoying to find witnesses telling what we think a palpably false story, but we cannot assume that they could or should have said something else, and convict an accused on what we think they ought to have said. This is to some extent, I fear, what has been done in this case. We must, however, take the evidence of Sawan Singh and others and that of

the Biloches as it stands on the file, and as it stands I hold it quite insufficient to justify the conviction of the accused.

It has been considered to tell much against the accused that he did not report the case in Amritsar at once, and has been held impossible that he did not know whether any one was struck or not when he fired. Here again I must entirely dissent from the views expressed. If, as is the deduction to be drawn from the defence, it is true that the shot was fired from the tonga, and upon that shot, as would naturally occur, *all* the Biloches fell back from the pony whose progress they were interrupting, it is certainly not contrary to human nature that a man who rightly or wrongly believed himself in danger should whip up his horse and gallop on without waiting to enquire the effect of his shot. The Magistrate assumes that the man hit must have fallen at once; but unfortunately for this assumption all the evidence is dead against it, and Sawan Singh himself says that the man went on for 40 or 50 *karams*, and in face of all the accounts coming from South Africa of the entirely unexpected effects of wounds it is not safe to dogmatize from preconceived views as to what "must have occurred," when such views are not supported even by the medical or other evidence on the file. The accused gave the explanation that he did not report because believing no one was hurt, he did not wish his wife or himself to be dragged into Court, an explanation not in itself unlikely. It is suggested with great force further that if he had known that he had shot a man the first thing he would have done would have been to secure that his was the first account to go in. If he really knew that a man was shot how could he hope that nothing more would be heard of it, and would he not immediately report his own version? There appears to me to be much force in this argument of counsel, and that it was not given proper weight to.

After giving this case very full consideration, I have come to the conclusion that the evidence on the file shows that Mr. Mukerji certainly had his pony stopped while he was in the execution of his duty, that he was violently importuned, and if not actually attacked was put in fear of attack, that his prisoner most certainly escaped in consequence of the altercation if not, as Khattar said, actually released by Khattar, that Mr. Mukerji was in reasonable apprehension of a wholly unjustifiable attack upon him, and that he either fired off his gun in the confusion by accident, or with no definite aim, or that he fired, after warning them to desist, at the Biloches who were acting illegally, for even if it went no further the forcible arrest of his progress was illegal; he fired at them under the reasonable impression that he was about to be

attacked, and that if he did not use the gun which was lying ready to hand and which he did not deliberately seek or obtain for the purpose—a fact which has also not received the consideration it deserved—he would be attacked. I agree with the view of the lower Courts that the hurt was technically grievous owing to the perforation of the shoulder blade. The evidence of the Civil Surgeon makes it most probable that the bullet did not traverse the lung and the same evidence shows that Khattar's life was never in danger.

Finding therefore as I do that the case for the prosecution has not been proved, which is the only question, its inherent improbability, though great, being a subordinate factor, I have now to consider whether any offence has been committed at all, and if so, what that offence is. Section 308 is clearly inapplicable. It was suggested by the learned counsel for the defence that the subordinate Courts in general seem to forget the existence of such sections as Sections 98, 99, 100, 101 *et seq.*, Indian Penal Code, Section 334, Indian Penal Code and Section 46 *et seq.*, of the Criminal Procedure Code, and to ignore the right of private defence altogether. In this view I cannot entirely concur, but that they are too often overlooked and are very timidly applied is probably correct. In this case it appears to me clear that the accused had every reason to believe that he was about to be subjected to personal violence, that his carriage had been stopped, and that the Biloches refused to abate the restraint, in itself a criminal offence, that in the scuffle a person properly under arrest was either directly released or enabled to escape, and that the accused either let off his gun by accident, which is less probable, or that he fired it off without any careful aim at his assailants to secure his own safety which is possibly more probable. Under these circumstances he is entitled to an acquittal. If the gun went off by accident there was of course no offence, if he fired it under the circumstances noted above he comes under Section 101, Indian Penal Code, and is also entitled to an acquittal. I accordingly quash the conviction, acquit the prisoner and set aside the sentence. The accused will be discharged from his bail.

This disposes of the application for enhancement, in regard to which, however, I wish to offer a remark. The application on the facts as found by the lower Courts appears to have been fully called for. If I had been able to hold the charge proved, *i.e.*, that accused had deliberately shot Khattar in the back, I should in all probability have felt constrained to have materially enhanced the sentence, and I cannot understand on what grounds the lower Appellate Court reduced the sentence from one year to nine months.

The sentence passed would have been of course still more inadequate had the charge of firing twice been sustained. As, however, I have felt obliged to take a different view of the facts, the application must be dismissed.

Application allowed.

No. 6.

Before Mr. Justice Reid and Mr. Justice Harris.

HARNAMAN,—APPELLANT,

Versus

THE EMPRESS,—RESPONDENT.

} APPELLATE SIDE.

Criminal Appeal No. 611 of 1900.

Penal Code, Section 397—"Causes grievous hurt," meaning of.

A. fractured one of the arms of B. by striking one or two blows with a stick and thereby causing B. to fall to the ground, his object being to steal the pony on which B. was riding. After B. had fallen to the ground A. attempted to mount, and ride off, on the pony, and was only prevented from doing so by the girth of the pony's saddle breaking.

Held, that whether the fracture of the arm was caused by a blow or the fall to the ground, inasmuch as the appellant caused the fracture by an act done in furtherance of his intention to steal the pony, and that act was in itself an offence, Section 397 of the Penal Code was applicable.

It is immaterial whether the hurt which he intended to cause or knew himself to be likely to cause was or was not grievous hurt. Hurt, amounting to grievous hurt, was caused by an act, in itself an offence, done in furtherance of the intention to rob and at the time of committing robbery.

Appeal from the order of C. H. Atkins, Esquire, District Magistrate, Lahore, dated 8th June 1900.

The judgment of the Court was delivered by

REID, J.—This appeal has been referred to a Divisional Bench with the following remarks: "The question whether causes grievous hurt" in Section 397, Indian Penal Code, means "commits the offence of grievous hurt or not is not quite clear. District Magistrate finds that it only means causes injury which amounts to grievous hurt, and I do not say that he is wrong, but the point is not quite clear and I can find no ruling." 5th Dec. 1900.

So far as we are aware there is no direct authority on the subject contained in the reports of cases tried under the Penal Code, but in the notes to the Code compiled by Sir W. Morgan, C. J., and Mr. Justice A. G. Macpherson, published in 1863, the following

appears: "A minimum punishment, not less than seven years, must be imposed on the offender or those of the offenders who in any way or by any means cause grievous hurt at the time of committing a robbery," and we see no reason to doubt that the rule laid down in this note has been consistently followed by the Courts which administer the Penal Code.

Section 319 of the Code is in the following words, "whoever causes bodily pain, disease or infirmity to any person is said to cause hurt," and Section 320 specifies the kinds of hurt which are designated as grievous."

In Section 394 of the Code the word "voluntarily" appears, as also in Sections 414 and 460, and in sixteen of the sections in Chapter XVI, which immediately precedes the Chapter in which Sections 394, 397, 414 and 460 appear, while it is omitted from Section 459.

Sections 297 and 459 have stood in the Penal Code without the word "voluntarily" ever since the Act received the consent of His Excellency the Governor-General on the 6th day of October 1860, and we see no reason for importing that word into the section under consideration, merely because it appears in other sections or because the offence punishable under Section 325 is that of "voluntarily" causing grievous hurt.

For the purposes of the present appeal, however, it is unnecessary to consider the question in the detail which might be necessary had the act by which grievous hurt was caused not been done in furtherance of the intention to rob.

On the merits we hold that the appellant fractured one of the arms of Mussammat Jowalo by striking one or two blows with a stick and thereby causing Mussammat Jowalo to fall to the ground, his object being to steal the pony on which she was riding. After she had fallen to the ground he attempted to mount, and ride off, on the pony, and was only prevented from doing so by the girth of the pony's saddle breaking. On these facts we hold that Section 397 of the Code is applicable, whether the fracture of the arm was caused by a blow or the fall to the ground, inasmuch as the appellant caused the fracture by an act done in furtherance of his intention to steal the pony, and that act was in itself an offence.

In our view of the law, it is immaterial whether the hurt which he intended to cause or knew himself to be likely to cause was or was not grievous hurt. Hurt, amounting to grievous hurt, was caused by an act, in itself an offence, done in furtherance of the intention to rob and at the time of committing the robbery, and we

have no hesitation in applying Section 397, the minimum sentence under which has been passed.

The appeal is dismissed.

Appeal dismissed.

No. 7.

Before Mr. Justice Reid and Mr. Justice Harris.

MAMUN,—APPELLANT,

Versus

THE EMPRESS,—RESPONDENT.

} APPELLATE SIDE.

Criminal Appeal No. 786 of 1900.

Criminal Procedure Code, 1898, Sections 233, 234, 239 and 537—Distinct offences—Effect of joint trial for distinct offences in the same proceeding—Irregularity.

Where three accused, A., B. and C. were at one and the same trial tried for three dacoities committed during the course of a single day, and C. in addition with rescuing a prisoner from the custody of the police, and with the murder of a constable, and with taking part in the dacoity in which the constable was murdered.

Held, that as the charges were kept separate and the opinions of the assessors were separately recorded on the charges which affected C. only, and those which affected all the prisoners, they were not prejudiced by the procedure adopted, and that that procedure did not occasion a failure of justice, the joint trial though an irregularity was cured by Section 537, and would not necessitate setting aside the trial and convictions.

Queen-Empress v Kutti ⁽¹⁾, *In the matter of Luchmi Narain* ⁽²⁾, *Queen-Empress v. Chandi Singh* ⁽³⁾, *Queen-Empress v. Fakirapa* ⁽⁴⁾, *Queen-Empress v. Mulua* ⁽⁵⁾, *Queen-Empress v. Chandra Bhuiya* ⁽⁶⁾, and *Jang v. Queen-Empress* ⁽⁷⁾, referred to.

Appeal from the order of W. C. Renouf, Esquire, Sessions Judge, Ferozepore Division, dated 18th August 1900.

Government Advocate, for respondent.

The judgment of the Court was delivered by

REID, J.—This case has come before us in appeal and, under 10th Dec. 1900. Section 374 of the Code of Criminal Procedure, for confirmation of the capital sentence passed on the appellant, Mamun, under Sections $\frac{302}{149}$ of the Penal Code, in respect of the murder of Ralla Ram. The appellant and Dewa Singh, appellant in Criminal

⁽¹⁾ *I. L. R.*, XI Mad., 441.

⁽⁴⁾ *I. L. R.*, XV Bom., 491.

⁽²⁾ *I. L. R.*, XIV Cal., 128.

⁽⁵⁾ *I. L. R.*, XIV All., 502.

⁽³⁾ *I. L. R.*, XIV Cal., 395.

⁽⁶⁾ *I. L. R.*, XX Cal., 537.

⁽⁷⁾ 5, P. R., 1900.

Appeal No. 917 of 1900, and Hira Singh, appellant in Criminal Appeal No. 918 of 1900, were tried jointly, and their appeals can be disposed of together.

The three appellants were charged with having committed three dacoities on the 25th December 1899, and Mamun was also charged with having murdered Ralla Ram while rescuing a prisoner from the custody, with having taken part in a dacoity after Ralla Ram was murdered, the property stolen belonging to him and to other policemen, and with rescuing the prisoner.

Mamun has been sentenced to be hanged under Sections $\frac{302}{149}$, and each of the appellants was sentenced to be transported for seven years on each of the charges of dacoity under Section 395 of the Penal Code.

The first question for consideration is whether all or any one of these convictions should be set aside on the ground that the joint trial was in contravention of the provisions of Section 233 of the Code of Criminal Procedure.

The joint trial of the three appellants for the three dacoities alleged to have been committed on the 25th December was justified by Sections 234 and 239 of the Code, although each of these dacoities formed a separate transaction, and difficulty only arises with reference to the charges on which Mamun alone was tried.

Section 234 limits the number of offences for which a person may be tried at one trial to three, and we have no hesitation in holding that the joint trial of Mamun on the remaining charges constituted an irregularity.

The more recent authorities on the question whether this irregularity is cured by Section 537 of the Code are—

(I). *Queen-Empress v. Kutti* ⁽¹⁾, in which A. was tried for theft, and B., C. and D. were tried for rescuing A. from lawful custody, in one trial. The Court held that, although it was irregular to try the prisoners in both cases together, there was no reason to think that they had been prejudiced by the irregularity, and reversed the order of the lower Appellate Court which had set aside the conviction.

(II). In the matter of *Luchmi Narain* ⁽²⁾, in which Petheram, C. J., remarked that if a man were tried for four specific offences at one trial it would not merely be an irregularity which could be cured by Section 537 of the Code, but a defect in the trial which would render the whole trial inoperative unless it were cured by some

⁽¹⁾ *I. L. R.*, XI *Mad.*, 441. ⁽²⁾ *I. L. R.*, XIV *Cal.* 128.

subsequent proceeding, by striking out some portion of the charge as to the propriety or legality of which he did not express an opinion. The remark was "obiter," as the learned C. J. held that it had not been shown that the prisoner had been tried for more than three offences in one trial.

(III). *Queen-Empress v. Chandi Singh* (1), in which Petheram, C. J., and Ghose, J., held that the joint trial of A., B., C., D. and E., under Section 147 of the Penal Code, for rioting on the 5th of December on land belonging to a certain factory, and of B., C., D. and E. under Section 447 of that Code, for criminal trespass on the same land on the 9th December, was an illegal proceeding under Section 233, and that the illegality was not cured by Section 537 which cures errors, omissions and irregularities, but not an absolute illegality. The Court set aside "the trial and conviction" and directed "that the prisoners be discharged from custody."

(IV). *Queen-Empress v. Fakrapa* (2), in which the joint trial of four persons on separate charges, seven of which affected one of the accused, while six affected another, five affected another, and four affected all four, accused, was set aside on the grounds that the joint trial did not come within the provisions of Sections 235 and 239, and that the prisoners were prejudiced, being exposed to the chance of conviction of some offence, different to that for which they were being tried. The Court ordered fresh trials.

(V). *Queen-Empress v. Mulur* (3), in which the four appellants had been sentenced to death under Section 302 of the Penal Code and to two terms of rigorous imprisonment for seven years under Section 392 of the same Code, murder having been committed in the course of the second robbery, which was committed about three miles from the scene of the first.

Edge, C. J., and Blair, J., held that the robbery without murder was a distinct offence from the murder within the meaning of Section 233, and that the offences were not of the same kind within the meaning of Section 234, and expressed the opinion that, in cases of so serious a nature as that of murder, offences not immediately connected with the murder ought not, for the purposes of charge and trial, to be dealt with together.

The Court further held that the joint trial was an error or irregularity within the meaning of Section 537, and was not illegal in the sense which would make the whole trial void, and fully discussed the question of prejudice to the prisoners.

(1) *I. L. R.*, XIV Cal., 395. (2) *I. L. R.*, XV Bom., 491.

(3) *I. L. R.*, XIV All., 502.

Their Lordships further held that the evidence produced to prove that the prisoners had taken part in the robbery without murder would have been extremely relevant and admissible on the question of identity, which had to be determined in the trial for murder, and that the error or irregularity in trying the prisoners on the various charges in the same trial did not occasion a failure of justice and did not prejudice the prisoners. The convictions were maintained, except in the case of one prisoner, whose convictions were set aside and a re-trial ordered on other grounds.

(VI). *Queen-Empress v. Chandra Bhuiya* ⁽¹⁾, in which two cross cases of rioting and grievous hurt were tried together, with the help of one set of assessors, who were “invited to give their opinions in the two cases at one time, the cases being inextricably “connected.” It was held that, although the procedure followed was irregular, it could safely be affirmed that the mode of trial did not prejudice the prisoners, and that a re-trial was not necessitated by the irregularity.

(VII). *Jang v. Queen-Empress* ⁽²⁾, which dealt with the joint trial of A, B. and C. for being in possession of property stolen in a dacoity, and of C. for being in possession of property stolen on another occasion and for an offence against the Arms Act. C. alone applied for revision, and Clark, C. J., set aside the convictions under Section 379 of the Penal Code and the Arms Act of C. who had been acquitted on the joint charge, but convicted in respect of the other property and arms, holding that C. had been prejudiced by the procedure adopted, inasmuch as it would have been very difficult for the convicting Magistrate not to take into account the strong presumption arising against C. from the possession of the alleged proceeds of the dacoity, while the lower Appellate Court appeared to think that C. was convicted in respect of those proceeds. In the case before us the joint trial was doubtless irregular, but the true rule to be deduced from the authorities cited appears to us to be that each case is to be considered on its own merits, and that every infringement of the rule contained in Section 233, not provided for in the remaining sections of Chapter XXIII, is not an illegality which necessitates the trial being set aside, but may be an irregularity which can be cured by Section 537, if it did not prejudice the accused or occasion a failure of justice.

There appears to us to be no distinction, as regards the gravity of the infringement of Section 233, between (i) the joint trial of distinct offences of a different kind, (ii) the joint trial of more than three offences of the same kind, and (iii) a joint trial

⁽¹⁾ *I. L. R.*, XX Cal., 537.

⁽²⁾ 5, *P. R.*, 1900.

which combines these two infringements of the rules contained in the sections under consideration.

The same considerations arise in each of these cases, and the question whether Section 537 saves the trial must be decided on the same lines in each case.

The case before us is, in a great measure, on all fours with that dealt with in *Queen-Empress v. Mulua* (1). The appellants were charged with being members of a gang of dacoits who were concerned in all the offences charged, and the only distinction drawn in the cases of Hira Singh and Dewa Singh is that they were not actually present when the prisoner was rescued and Ralla Ram was killed and subsequently robbed, being at the time engaged in cooking or purchasing food for the other dacoits.

Had the three charges of dacoity, on which all the appellants were tried, been the only charges before the Court below, evidence as to the attack on Ralla Ram and the rescue of his prisoner would have been relevant to establish the identity of the members of the gang, all the offences charged having been committed on one day and in a limited area, while evidence of the association of Hira Singh and Dewa Singh with the band on the day in question, whether as cooks or in any other capacity, would have been relevant on the question of their complicity in the dacoities committed later in the day, and of their identity with members of the band taking part in those dacoities.

The charges were kept separate and the opinions of the assessors were separately recorded on the charges which affected Mamun only and those which affected all the appellants. In our opinion the appellants were not prejudiced by the procedure adopted and that procedure did not occasion a failure of justice. For the reasons recorded above the joint trial was, in our opinion, an irregularity which is cured by Section 537, and does not necessitate setting aside the trial and convictions. On the merits we concur with the learned Sessions Judge and the assessors in holding that the charges on which the appellants were convicted have been established. The record contains ample evidence that Nur Burhan was arrested by Ralla Ram and other policemen at the village Sanda, and that Mamun, Dewa Singh, Hira Singh and five or six other men were at the village before the arrival of the police, that Mamun and some others rescued Nur Burhan and attacked Ralla Ram with *charis* and sticks, the result being that Ralla Ram's skull was fractured in two places, one of his arms was broken and he died next day.

(1) *I. L. R.*, XIV All., 502.

Although the evidence as to who actually struck Ralla Ram on the head or the arm is conflicting, we are satisfied that Mamun was one of five or six men who attacked him with the object of rescuing Nur Burhan, and that the injuries inflicted on him were caused in prosecution of their common object. Some of the attacking party were armed with *chivis*, and each member of the party must have known that fatal injuries might be caused.

On the 17th January 1900 Mamun made a confession to a Magistrate of the 1st class, in which he admitted being with the gang who committed the three dacoities, but represented that he was at a little distance, grazing a camel, when Ralla Ram was killed by some of the gang.

Nur Burhan confirmed this statement, but we accept the evidence of the witnesses who deposed that Mamun joined in the attack, during which Dewa Singh and Hira Singh were engaged in cooking or purchasing food for the gang.

The three dacoities, in which Umra, Sham Das, Canal Darogha, and Ghulam Hussain, Police Sergeant, were robbed, the first and last suffering grievous hurt, are amply proved, and there is ample evidence that the appellants took part in these dacoities. As already stated, Mamun confessed on the 17th January that he was present at each of these three dacoities, taking an active part in at least one of them.

On the 19th January 1900 Hira Singh confessed to a Magistrate of the 2nd class that he joined the gang of dacoits, that he was present with them throughout the 25th December, and took an active part in robbing Umra and Ghulam Hussain, and he made a supplementary statement to a Magistrate of the 3rd class on the 28th January, while Dewa Singh, on the 4th February, made a confession, to a Magistrate of the 2nd class, that he joined the gang and was with them throughout the 25th December, helping Hira Singh to cater for the others, while Ralla Ram was being attacked, and being present at each of the three dacoities subsequently committed.

These confessions were withdrawn before the committing Magistrate, the appellants denying making them.

In their appeals to this Court Mamun pleads that he had nothing to do with the dacoits, and did not join in any of the offences charged, while Hira Singh and Dewa Singh plead that they were merely servants of the dacoits, and did not join in any of the dacoities.

We cannot accept these pleas, in the face of the confessions and the other evidence on the record.

Having regard to the nature of the attack on Rulla Ram and to the lawless and reckless conduct of the gang, we see no reason for interference with the capital sentence passed on Mamun, which we confirm; and the sentences passed on the appellants for the dacoities on Umra, Sham Das and Ghulam Hussain are by no means excessive.

We dismiss the appeals, maintain the convictions and confirm the sentences.

Appeal dismissed.

No. 8.

Before Mr. Justice Reid and Mr. Justice Harris.

QUEEN-EMPRESS, -APPELLANT,

Versus

SUNDAR SINGH AND OTHERS,—RESPONDENTS.

} APPELLATE SIDE.

Criminal Appeal No. 881 of 1900.

Excise Act (XII of 1896), Sections 36, 45 and 57—Court taking cognizance of the offence of working an illicit still on a police chalan—Absence of complaint or report by Collector or Excise Officer.

Held, that a Magistrate can take cognizance of the offence of working an illicit still on the report or *chalan* of a Deputy Inspector of Police, who is an Excise Officer under Punjab Government Notification No. 735 $\frac{1}{2}$, dated 26th March 1885, which notification under Section 2 (2) of the Excise Act of 1896 is still in force, the police *chalan* being under Section 190 (6) of the Code of Criminal Procedure; a police report of facts constituting an offence.

Queen-Empress v. Chet Singh (1), *Chatra v. Queen-Empress* (2), and *Dewa Singh v. Queen-Empress* (3), followed. *Pirag v. Queen-Empress* (4), distinguished.

Appeal from the order of Lala Mulraj, Magistrate, 1st class, with appellate powers, Amritsar, dated 6th April 1900.

Government Advocate, for appellant.

The judgment of the Court was delivered by

HARRIS, J.—This is an appeal by the Local Government from 18th Dec. 1900.
an appellate order of acquittal of a Magistrate with appellate powers, whereby the convictions of the respondents Dewa Singh, Sundar Singh and Sardul Singh of the offence of working an illicit still under Section 45, Act XII of 1896, were set aside on the ground that the first Court could not legally take cognizance of the case

(1) 22, P. R., 1900, Cr.

(2) 15, P. R., 1887, Cr.

(3) 4, P. R., 1893, Cr.

(4) 9, P. R., 1897, Cr.

as no complaint or report had been made within the meaning of Section 57 of that Act.

The two Magistrates agreed on the facts and we see no reason to differ from their finding that the respondents were working a still in contravention of Section 5 of the Act.

It appears that an informer found respondents working the still and told the zaildar who went to the spot with other witnesses and, finding the information correct, sent a chowkidar to the police station whence the Deputy Inspector of Police came to the scene, seized the plant and arrested the respondents. The respondents were chalaned within 24 hours and placed before the Magistrate.

In appeal it was held on the fancied authority of *Pirag v. Queen-Empress* ⁽¹⁾ and in accordance with Criminal Revision No. 2431 of 1898 of this Court that there was "no complaint or report" of the offence under Section 45, Act XII of 1896, by the Collector "or Excise Officer as required by Section 57, and so no Court could "take cognizance of the offence."

It is not quite clear from the judgment whether the legal defect was considered to be the absence of complaint or report, or in the status of the officer who made such complaint or report.

But on neither view was the Appellate Court correct.

It was perhaps overlooked that, as pointed out by the first Court, Punjab Government Notification No. 735½, dated 26th March 1885, which under Section 2 (2) of the Act is still in force, the Deputy Inspector of Police was an Excise Officer with powers under Sections 36 and 38. The Deputy Inspector of Police acted legally under Section 38 and Section 41.

Further we agree with *Queen-Empress v. Chet Singh* ⁽²⁾, a case on all fours with the present, that "a police *chalan* is a police "report of the facts constituting an offence (Section 190 (b), Criminal Procedure Code) with the further incident that the accused "and witnesses accompany the report." Both in *Chatra v. Queen-Empress* ⁽³⁾ and *Dewa Singh v. Queen-Empress* ⁽⁴⁾ the report was by way of *chalan*, and the provisions of the corresponding section in the Excise Act then in force were held to have been complied with.

Had the Appellate Court perused *Pirag v. Queen-Empress* ⁽¹⁾, it would at once have apprehended that that ruling is distinguishable, as the learned Judge who pronounced that judgment pointed out (see page 24), and as was also indicated in *Queen-Empress v. Chet Singh* ⁽²⁾ at page 51.

⁽¹⁾ 9, *L. R.*, 1897, Cr.

⁽²⁾ 22, *P. R.*, 1900, Cr.

⁽³⁾ 15, *P. R.*, 1887, Cr.

⁽⁴⁾ 4, *P. R.*, 1893, Cr.

We accept the appeal and, setting aside the order of acquittal of the 6th April, we affirm the conviction of Dewa Singh, Sundar Singh and Sardul Singh under Section 45, Act XII of 1896.

As four months' imprisonment is under the section the maximum term, and the case is not a grave one, we alter the substantive term of imprisonment to be undergone by each respondent to one month, the period already undergone by each to be deducted. The orders as to fine will stand.

Appeal allowed.

— — —
No. 9.

Before Mr. Justice Clark, Chief Judge.

AYA RAM,—PETITIONER,

Versus

QUEEN-EMPRESS,—RESPONDENT.

Criminal Revision No. 1498 of 1900.

} REVISION SIDE.

Punjab Municipal Act, 1891, Section 92 (5)—Building a house without receiving any order from the Municipal Committee—Notice under sub-section (1) of Section 92.

Held, that where a Municipal Committee failed to pass any order within six weeks after the receipt of a valid notice under sub-section (1) of Section 92 of the Punjab Municipal Act, the accused was warranted under sub-section (5) of that section to build his house, and must be deemed to have obtained the necessary sanction.

Petition for revision of the order of A. E. Hurry, Esquire, Sessions Judge, Lahore Division, dated 1st November 1900.

Brandon, for petitioner.

The following judgment was delivered by the learned Chief Judge :

CLARK, C. J.—On 27th September 1899 Aya Ram applied to the Municipal Committee, Lahore, to erect or re-erect his house, and furnished a plan of the proposed building. The application and plan were referred to Mr. Harnam Das, member of the Municipal Committee, for report ; he lost them, and made no report, and no orders were given by the Committee to Aya Ram : this was equivalent, under Section 92 (5), Act XX of 1891, to sanctioning the proposed building, and accordingly Aya Ram in January and February built the house with *tharas* and balconies as shown in his plan ; at least he alleges that he has built in accordance with the plan furnished by him, and it is not shown that this is not so, the point has not been gone into by the Magistrate. 26th Jany. 1901.

On 21st April 1900 Aya Ram was served with a notice under Section 95 to remove these *tharvas* and balconies, and has been fined and ordered to remove these extensions.

I am of opinion that Aya Ram was warranted under Section 92 (5) in what he did, and he had under that section sanction to build this house, he cannot be visited with the neglect of the Committee to pass orders on his application within six weeks.

I accept the revision and set aside the order of the Magistrate.

Application allowed.

No. 10.

Before Mr. Justice Clark, Chief Judge, and Mr. Justice Harris.

QUEEN-EMPRESS,—APPELLANT,

Versus

WAZIR SINGH,—RESPONDENT.

Criminal Appeal No. 853 of 1900.

APPELLATE SIDE. {

Excise Act, 1896, Section 3 (1) (i) —“Spirit”—Joint possession of father and son—Mixture of spirit and lahan.

In a case where 1 *ser* 11½ *chittacks* of liquor, being a mixture of spirit and *lahan*, was found in the house of the accused, in which house his son also resided, and where it was impossible to say how much *lahan* was mixed with the spirit owing to an accident in distillation.

Held, that the accused had rightly been convicted by the Magistrate. In the absence of proof of a joint possession, the possession must be deemed to be that of the accused, the owner of the house, the presence of a son making no difference, as it was not proved that the son had joined in the purchase, or that the liquor had been held jointly with him, and that the whole of the liquor was country spirit within the definition of Section 3 (1) (i) of the Excise Act, the fact of *lahan* being mixed with it making no difference, as the whole was liquor containing alcohol obtained by distillation.

Queen-Empress v. Salaru (1) followed.

Appeal from the order of H. Scot Smith, Esquire, Sessions Judge Amritsar Division, dated 18th June 1900.

Government Advocate, for appellant.

The judgment of the Court was delivered by

28th Jany. 1901.

HARRIS, J.—This is an appeal by the Local Government from an order of acquittal passed by the Sessions Judge, Amritsar, on the appeal of one Wazir Singh who had been convicted under

Section 51 of the Excise Act (XII of 1896) of having in his possession more than 1 *ser* of country spirit, and sentenced to one month's rigorous imprisonment and Rs. 50 fine, or one month's further rigorous imprisonment in default of payment of fine.

There appears no doubt that 1 *ser* 11 $\frac{3}{4}$ *chittarks* of liquor was found in Wazir Singh's house, in which house also resided his son, Samand Singh (a youth of 17 years of age) and his wife. The defence, which was not borne out by the evidence, was that some enemy must have deposited the liquor where it was found, and in appeal it was urged that the liquor found was not all country spirit, but had been added to, as testified by the Excise *darogha*, by the boiling over of the *lahan* employed in the distillation.

The Sessions Judge held that if the possession of the liquor were proved to be joint possession of father and son the quantity in possession of each was not over 1 *ser* per head, and further that on the *darogha's* evidence it could not be asserted by the prosecution that there was more than a *ser* of country spirit in the whole mixture of spirit and *lahan*.

On the first point we are in accord with Roe, J., in *Queen-Empress v. Salau* (1) that "where a defence of joint possession is set up, it must at any rate be clearly proved not merely that a certain number of people lived in a house and may have joined in the purchase of the drug, and that it may have been held by one for the use of all, but that this has actually been the case."

In this case the defence of joint possession was not set up, and on the facts disclosed the possession must be deemed to be that of Wazir Singh, the owner of the house and the head of the family, the presence of a son of 17 years of age making no difference.

We are not at present prepared to say that had joint possession been established the conviction could have been upheld, though Frizelle, J., inclined to that opinion in the ruling above cited.

On the second point it is of course impossible to say how much *lahan* (declared to be "fermented liquor" by Punjab Government Notification No. 95, dated 12th January 1886), if any, there was mixed with the country spirit owing to accident in distillation. But it was not for the prosecution to demonstrate the country spirit to be of any particular strength, and the whole of the liquor must be deemed to be country spirit, the accidental admixture being a negligible element, as the whole was a "liquor containing alcohol obtained by distillation," which is the definition of "spirit" in Section 3 (1) (i) of the Act.

(1) 13, P. R., 1897, Cr.

For the above reasons we hold that Wazir Singh was rightly convicted, and setting aside his acquittal we restore his conviction.

We do not consider it necessary to re-impose the unexpired portion of sentence of imprisonment passed by the Magistrate, but the sentence of fine is restored, except as to the term of imprisonment to be suffered in default which is reduced in accordance with Section 65, Indian Penal Code, to three weeks' rigorous imprisonment, the maximum substantive term of imprisonment under Section 51, Act XII of 1896, being three months.

Appeal allowed.

No. 11.

Before Mr. Justice Reid.

CROWN

Versus

BARKAT ALI.

Criminal Revision No. 1554 of 1900.

Criminal Procedure Code, 1898, Section 395—Whipping—Sentence of imprisonment in lieu of whipping—Powers of Magistrate.

Held, that a Magistrate cannot revise his order under Section 395 (1) of the Code of Criminal Procedure and pass a sentence of imprisonment in lieu of whipping, when the prisoner is found to be unfit to undergo such sentence, if the aggregate of such substituted term together and the original term awarded by him is in excess of the maximum which he was competent to inflict.

Queen-Empress v. Ram Baran Singh (1) followed.

Case reported by Captain G. C. Beadon, Sessions Judge, Jullundur Division, on 30th November 1900.

The material facts of this case and the question referred for the decision of the Chief Court sufficiently appear from the following judgment :—

12th Feby. 1901.

REID, J.—Barkat Ali, petitioner, was sentenced by a Magistrate of the 1st class to rigorous imprisonment for 2 years and to 30 stripes under Sections $\frac{37}{75}$ of the Penal Code, on the 31st August 1898.

The Superintendent of the Jail in which the petitioner was confined reported that he was unfit to undergo the sentence of whipping which was suspended for six months, and the petitioner being again reported unfit at the expiry of that period, the convicting Magistrate's successor sentenced the petitioner, in lieu of whipping, to further rigorous imprisonment for three months,

under Section 395 (1) of the Code of Criminal Procedure. I concur in the conclusion, arrived at in *Queen-Empress v. Ram Baran Singh* (1) that the sentence passed in lieu of whipping is in contravention of the rule laid down in Section 395 (2), a sentence of rigorous imprisonment for 2 years and 3 months being in excess of the term which either of the Magistrates, on whom special powers under Section 30 had not been conferred, was competent to inflict under Section 32 of the Code.

I set aside the sentence of rigorous imprisonment passed in lieu of whipping.

No. 12.

Before Mr. Justice Reid.

CROWN

Versus

KALU.

REVISION SIDE.

Criminal Revision No. 1592 of 1900.

Security for good behaviour—Jurisdiction of Magistrate to require from a person not residing within his jurisdiction—Criminal Procedure Code, 1898—Section 110.

Held, that a Magistrate has no jurisdiction to proceed against a person under Section 110 of the Code of Criminal Procedure and require security for good behaviour when that person is not residing within the limits of his jurisdiction.

Ketaboi v. Queen-Empress (2) followed.

Case reported by S. Olifford, Esquire, Sessions Judge, Hoshiarpur Division, on 8th December 1900.

The material facts of this case and the question referred for the decision of the Chief Court sufficiently appear from the following judgment:

REID, J.—Kalu, resident in the Umballa District, was arrested 14th Feby. 1901. under suspicious circumstances, in the Hoshiarpur District.

Proceedings under Section 109 of the Code of Criminal Procedure were instituted against him, and, under the orders of the Magistrate of the district, he was required to show cause under Section 110 of the Code, the proceedings under Section 109 being abandoned. He was eventually required to execute a bond, with two sureties, in the sum of Rs. 150 each, to be of good behaviour for three years.

The term was reduced by the learned Sessions Judge to one year, and the same Judge has now referred the order to this Court

(1) *I. L. R.*, XXI All., 25.

(2) *I. L. R.*, XXVII Cal., 993.

to be dealt with on the revision side, after perusing the ruling of a Division Bench of the Calcutta Court, in *Ketaboi v. Queen-Empress* ⁽¹⁾. I concur in the interpretation placed on the words "any persons within the local limits of his jurisdiction" in Section 110 of the Code by that Division Bench and, for reasons recorded in the judgment cited, I hold that the person proceeded against must be resident within the jurisdiction of the Magistrate who institutes proceedings.

I set aside the order. The bonds will be discharged and Kalu, if in jail, will be released.

No. 13.

Before Mr. Justice Chatterji.

CROWN

Versus

HARSA SINGH.

Criminal Revision No. 1574 of 1900.

Criminal Procedure Code, 1898, Section 526—Personal inspection of encroachment—Disqualification of Magistrate to try case.

Held, that a personal inspection by a Magistrate of the locality to test the correctness of the evidence and plans which may have been filed in a case which he is trying does not disqualify him from hearing and deciding it.

Queen-Empress v. Manikam ⁽²⁾ distinguished. *In re Lalji and others* ⁽³⁾ followed.

Case reported by W. Chevis, Esquire, Sessions Judge, Ferozepore Division.

K. C. Chatterji, for respondent.

The facts of this case were as follows:—

The accused on conviction by J. K. Tapp, Esquire, exercising the powers of a Magistrate of the 2nd class, in the Ferozepore District, was sentenced by order, dated 5th September 1900, under Section 164 of Act XX of 1891, to 1 rupee fine or one day's simple imprisonment.

The proceedings were forwarded for revision on the following grounds:—

That there has been an encroachment is clear. For whereas the Committee sanctioned the erection of the building as shown in the plan filed by Harsa Singh when applying for permission to re-

⁽¹⁾ *I. L. R., XXVII Calc.*, 993. ⁽²⁾ *I. L. R., XIX Mad.*, 263.

⁽³⁾ *I. L. R., XIX All.*, 302.

build his house (and that plan shows the house in question as in the same line with Arjan's house), the plan prepared by Mr. Calvert, Assistant Commissioner, and the local inspection made by the Magistrate shows that the house has been pushed further into the street and does not now form a line with Arjan's house. The *tharas* in front of the house are a projection in front of the building and even allowing that they were erected at the same time as the building the case falls, I consider, within Section 95. But whether the case be regarded as one calling for punishment under Section 164 or Section 169 of the Act matters, I think, but little, as the encroachment is not a serious one and the building might be allowed to stand provided that a sufficient fine is inflicted to deter similar offences. To inflict a nominal fine is, I consider, simply an encouragement to others to commit similar encroachments, and if the fine be not enhanced I apprehend that similar encroachments will occur whenever a new house is built in Ferozepore City. I, therefore, send the file to the Chief Court with a recommendation that the fine be enhanced. I see no sufficient reason to alter the finding to one under Section 169 as I do not consider any punishment beyond that which can be awarded under Section 164 is necessary in this case.

The order of the Chief Court was delivered by

CHATTERJI, J.—After going through the record and taking time to consider my order I am of opinion that the finding as to encroachment cannot be successfully attacked on the revision side. Mr. K. C. Chatterji's arguments for the accused amount to a denial of the correctness of the conviction but they fail to establish such a gross error in appreciating the evidence or irregularity in procedure on the part of the Magistrate as calls for my interference with his finding on facts. It is argued that the Magistrate visited the spot and decided the question of encroachment on the result of his personal inspection and that in acting thus he constituted himself a witness and disqualified himself from trying the case, and reference is made to *Queen-Empress v. Manikam* ⁽¹⁾ in support of the contention. That however is a different case. In the present instance it was deposed on oath before the Magistrate and shown on a comparison of plans that the new house of the accused projected beyond the alignment of his old house which was in the same line with that of Arjan. Surely it was competent to the Magistrate to see on the spot whether this evidence was true or not. If a Magistrate can decide cases on inspection of plans produced in Court he can do so by seeing the ground or buildings in

25th Feb'y. 1901.

(¹) *I. L. R.*, XIX *Mad.*, 263.

situ of which the plans were put in evidence. His source of knowledge for purposes of decision is not limited to his ears, but he is permitted to make use of his eyes as well to test evidence and to understand the facts. I entirely agree with the following remarks of the learned Chief Justice of the Allahabad High Court in *re Lalji and others* ⁽¹⁾: "A Magistrate does not make himself a witness "by going to a place and viewing it for the purpose of understanding the evidence any more than does a Judge in England "who goes to view a place or do Jurymen who view a place under "an order make himself or themselves witnesses in the case. It "would be seldom that a Magistrate or a Judge or Jury could "come to a correct conclusion on conflicting evidence if they did "not import into the consideration of the evidence before them, not "only common sense but also common knowledge of what ordinarily "passes in life." Inspections are allowed in England, see Taylor on *Evidence*, 9th edition, pp. 363, 364; see also Section 60, Evidence Act. In this case no specific allegation is made that in viewing the spot the Magistrate has acted unfairly or in an unjudicial manner, and the mere act of inspection cannot, in my opinion, be treated as an impropriety on his part. I am disposed to hold on the contrary that his action was proper as well as legal. He certainly showed more sense in making use of his eyes in coming to a decision on the question of projection beyond the line of Arjan's house than in presuming to decide it sitting in Court on the conflicting statements of the witnesses of the opposing parties. Lastly, the explanation under Section 556 of the Code of Criminal Procedure appears to me to give its *quielus* to the objection.

I also find that the statement of Waid Din, Jamadar, of the Municipality, proves the projection and encroachment, and it is admitted by the accused himself in his examination that in the plan filed by him before the Committee when asking for leave to build his house was shown as in the same line with Arjan's whereas now it is not so. From this evidence as well as from the result of his personal inspection the Magistrate was justified in finding that accused's house projects beyond Arjan's and from this fact that encroachment has taken place. The conviction therefore cannot be disturbed.

The encroachment is very small but requires to be put down by the Municipality in the interests of the public. The fine of Re. 1 is ridiculous. I therefore enhance it to Rs. 25 in default of payment of which the accused will undergo two weeks' simple imprisonment.

(1) *I. L. R.*, XIX All., 302.

No. 14.

Before Mr. Justice Chatterji.

GANDA SINGH,—PETITIONER.

Versus

MUSSAMMAT ATMA DEVI,—RESPONDENT.

} REVISION SIDE.

Criminal Revision No. 1458 of 1900.

Maintenance—Criminal Procedure Code, 1898, Section 488—Husband having a second wife.

Held, that mere existence of a co-wife with whom the complainant had quarrels or want of affection for her or greater affection for the co-wife on the part of the husband are not sufficient grounds within the meaning of clause (3) of Section 488 of the Code of Criminal Procedure, 1898, for separate maintenance.

*Case reported by H. Scott Smith, Esquire, Sessions Judge,
Amritsar Division, on 12th November 1900.*

The facts of this case were as follows :—

On 10th July 1896 Mussammat Atma Devi petitioned for maintenance under Section 488, Criminal Procedure Code, alleging that her husband had beaten her and turned her out after robbing her of her ornaments and had taken another wife. The husband denied that the petitioner was his wife. Sheikh Nasir-ud-din, Magistrate, found that the petitioner was Ganda Singh's wife by *chidar-in-lazi* and passed an order for maintenance at Rs. 2-8-0 per mensem. On 25th February 1898 at the request of the parties the Magistrate passed an order that the parties would live together in future and no payment would be levied. In September 1897 the wife applied to the Court of Lala Amolak Ram for arrears from 25th February 1897 who rejected the application on 6th December 1897.

Ganda Singh, by Thakar Mahan Chand, exercising the powers of a Magistrate of the 1st class, in the Amritsar District, was ordered, by order, dated 18th April 1900, under Section 488 of the Criminal Procedure Code, to pay Rs. 2 per mensem to Mussammat Atma Devi as maintenance allowance.

The proceedings were forwarded for revision on the following grounds :—

The Chief Court remanded the case on 5th March 1898 for further enquiry as to whether the wife (Mussammat Atma Devi) had sufficient cause for not living with her husband (Ganda Singh). These proceedings ended in a compromise on the 7th May 1898, the woman saying she was willing to live with her husband.

On the 6th January 1900 she presented a new application applying for maintenance in which she stated that her husband had beaten her and refused to maintain her and had left her and since then had only sent her Rs. 8. Ganda Singh, the husband, in reply said he was quite willing to maintain her if she would live with him. The Court took the parties' evidence and after finding that the husband has another wedded wife whom he is fonder of than the complainant and that the two wives quarrel, fixed a monthly maintenance allowance of Rs. 2 per mensem on condition of complainant's being of good behaviour.

In my opinion the facts on which the lower Court has based his finding do not constitute a sufficient ground for the complainant's refusing to live with her husband.

The patwari and lambardar gave evidence to the effect that complainant would not live with her husband and she herself stated that she would never live in accused's house. The evidence of complainant's witnesses has been recorded in a very summary fashion. There is certainly no proof that Ganda Singh turned complainant out of his house. It appears to me that she is not content to live with him. In any case the Magistrate was not justified in fixing maintenance on the grounds stated by him and I recommend that his order may be set aside and further enquiry ordered if deemed necessary.

The case came before *Mr. Justice Chatterji* who passed the following order:—

9th March 1901.

CHATTERJI, J. —The respondent offered to maintain the complainant if she would live with him. The latter stated that she did not wish to go to his house. The Magistrate's grounds for awarding separate maintenance are that respondent has another wife and she and the complainant quarrel and that the respondent does not "love the complainant so well as before."

I do not think these reasons are sufficient. According to the custom of the country polygamy is allowable, and it is nothing unusual for the husband of several wives to prefer one wife to another. The latter fact by itself is not sufficient to justify the award of a separate maintenance under Section 488, Criminal Procedure Code, to the wife who considers herself aggrieved by not having the first place in her husband's affections. Quarrels between co-wives also would not be sufficient unless the husband habitually sides against the complainant and treats her unkindly. The main question is whether there is reasonable ground for apprehending ill-treatment of the complainant, see *Dhera Singh v. Mussammatt Nando* (1)

(1) 2, P. R., 1878, Cr.

The words of the proviso to clause (3) of Section 488 of the present Code are more general than those of the corresponding clause of the previous Act, but I apprehend this is only to enable the Court to take into consideration other grounds than habitual cruelty. I do not think they make any material change in the principles applied before the enactment of the present Code in cases in which the husband had another wife besides the complainant. At any rate I think the reason given by the Magistrate is not sufficient unless some positive fault on the part of Ganda Singh besides want of love for complainant or greater love for her co-wife is established. I do not lose sight of the fact that previously there was another case which was ultimately compromised. The facts of that case so far are in favour of the complainant, but the matter must still be decided by the Magistrate whether under the circumstances there is *just* ground for awarding her a separate maintenance. Mere existence of a co-wife with whom complainant cannot get on and greater affection for her on the part of Ganda Singh are not by themselves sufficient reasons. But sufficient grounds can still be shown by the complainant and I do not in the least mean to prejudge the question.

I set aside the order of the Magistrate and return the case to him for a fresh decision after any further inquiry that he may deem necessary, with reference to the foregoing remarks.

No. 15.

Before Mr. Justice Reid and Mr. Justice Robertson.

CHATAR SINGH AND OTHERS,—APPELLANTS,

Versus

THE EMPEROR OF INDIA,—RESPONDENT.

} REVISION SIDE.

Criminal Appeal No. 792 of 1900.

Dacoity—Abetment of—Penal Code, Sections 109, 395 and 397.

Where the abetment of dacoity charged consisted of pointing out to the dacoits the house to be robbed or of active participation in planning the dacoity and in taking charge of camels, used by some of the party, whilst the offence was being committed, the abettors should be charged and punished under Sections 303 of the Penal Code without any reference to Section 397, which is applicable only to those who actually commit a dacoity in which one of the acts specified therein is done.

Queen-Empress v. Mahabir Tiwari (1) and *Queen-Empress v. Unrao Singh* (2) followed.

(1) *I. L. R.*, XXI All., 263.

(2) *I. L. R.*, XVI All., 437.

Appeal from the order of Captain G. C. Beadon, Sessions Judge, Jullundur Division, dated 4th September 1900.

Shelverton, for appellants.

Assistant Legal Remembrancer, for respondent.

The judgment of the Court was delivered by

21st Feby. 1901.

REID, J.—The appellants in this appeal and in Criminal Appeals 893 and 915 of 1900 were tried jointly, and their appeals can be disposed of together.

Kirpal Singh and Kishen Singh have been convicted under Sections $\frac{397}{109}$ of the Penal Code, and have been sentenced to rigorous imprisonment for ten years and seven years, respectively, while the other appellants have been convicted under Section 397, and have each been sentenced to rigorous imprisonment for 10 years.

A dacoity was committed on the night of the 5th May 1899, with great boldness, and property estimated by the complainant to be worth Rs. 13,000 was stolen.

The question for consideration is whether all or any of the appellants took part in the dacoity.

The appellants Chatar Singh and Kirpal Singh, who are brothers, and Ajmer Singh, their nephew, are inhabitants of Matta, in Faridkot territory, Sewa Singh lived at Saranwan, in Faridkot, and Kishen Singh lived in the Jullundur District.

The conviction is based on the evidence of Bhola Singh, approver, who lived at Matta, corroborated, as to Sewa Singh, by Jawinda, complainant, Basta Singh and Wariam Singh, who deposed that they identified him as one of the dacoits, as to Chatar Singh, by the complainant and Wariam Singh, as actually taking part in the dacoity, as to Ajmer Singh, by the complainant, Basta Singh, Wariam Singh and Buri, as actually taking part in the dacoity, and as to all the appellants by several witnesses who saw all the appellants together shortly before, and in the neighbourhood of the scene of the dacoity.

Kirpal Singh's abetment consisted of active participation in planning the dacoity and in taking charge of the camels used by his party, while the dacoity was being committed, and Kishen Singh's abetment consisted of pointing out to the dacoits a house to be robbed.

Counsel for Chatar Singh, Kirpal Singh and Ajmer Singh contends that the identification is worthless, and that Bhola Singh implicated his clients in consequence of enmity which exists

between two factions, to one of which he belongs while these three appellants belong to the other, in Matta. A further contention is that, inasmuch as Sewa Singh was arrested at the end of January or early in February and these three appellants were arrested on the 13th May, there was obviously no connection between the three and Sewa Singh, and another contention is that the dacoits could not have assembled at Ajmer Singh's house, as described by the approver, because Basant, a witness for the appellants deposed that no men outside the family were allowed to enter Ajmer Singh's court-yard, the women of the family being in *pardah*. This witness is brother of Ajmer Singh.

There is evidence of enmity between the factions to which Bhola Singh and the three appellants, respectively, belong, but we cannot reject the ample evidence, that the appellants and Bhola Singh were frequently seen together before the dacoity, and that Chatar Singh and Ajmer Singh actually took part in it, merely because it is possibly improbable that members of opposing factions should join in committing an offence. The evidence of enmity does not satisfy us that Bhola Singh and the others entertained any special ill-feeling towards each other.

Kirpal Singh was not identified by any of the eye-witnesses to the dacoity as one of the dacoits, but we are satisfied that he was with his brothers and the other dacoits up to the actual commencement of the dacoity and abetted the dacoits. The evidence of the approver has in our opinion been amply corroborated, and we see no reason to doubt that Chatar Singh, Sewa Singh and Ajmer Singh took an active part in the dacoity itself and were abetted by Kirpal Singh and Kishen Singh.

Fire-arms were used and several persons were injured by the dacoits, and Section 397 of the Penal Code is therefore applicable to Sewa Singh, Chatar Singh and Ajmer Singh, but the charge should have been under Sections $\frac{395}{397}$, inasmuch as Section 395 provides the punishment for dacoity, while Section 397 is merely a rider to the previous section, providing a minimum sentence in certain cases.

Counsel for the Crown admits that the charge under Sections $\frac{395}{397}$ is inapplicable to the cases of Kirpal Singh and Kishen Singh.

Section 397 is only applicable to a person who does not use a deadly weapon, or cause grievous hurt, or attempt to cause death or grievous hurt, by reason of Section 34 of the Penal Code, which makes a person committing a dacoity liable for such act of a fellow dacoit, committed in furtherance of the common object, in the same manner as if the act had been done by him alone.

The question has been dealt with in *Queen-Empress v. Mahabir Tivari* ⁽¹⁾ and Section 397, as interpreted in that case, merely makes it obligatory on a Court passing sentence to pass a sentence of at least seven years' rigorous imprisonment on all persons joining in committing a dacoity in which such an act has been done in furtherance of the common object. We concur in that interpretation, but, when the question of the liability of an abettor is considered, Section 109 has to be read with the definition of "offence" in Section 40.

We concur in the opinion expressed in *Queen-Empress v. Umrao Singh* ⁽²⁾ at page 442, that Section 397 does not create a specific offence.

The offence of dacoity is created by Section 391, and is punishable under Section 395, and an abettor of dacoity is, in our opinion, punishable under Sections $\frac{395}{109}$ without any reference to Section 397, which we hold to be applicable only to persons actually committing a dacoity in which one of the acts specified in it is done.

We dismiss the appeals of Sewa Singh, Ajmer Singh and Chatar Singh, and we allow the appeal of Kirpal Singh only so far as to set aside the conviction under Sections $\frac{397}{109}$ and convict him under Sections $\frac{395}{109}$. The sentence of rigorous imprisonment for ten years passed on him is by no means excessive, and we are unable to distinguish between his guilt and that of the dacoits.

The learned Sessions Judge has recorded his opinion that Kishen Singh, who is 66 years old, was a tool in the hands of the dacoits, and passed a sentence of rigorous imprisonment for seven years solely because he considered that to be the minimum prescribed by law.

We set aside the conviction of, and the sentence passed on Kishen Singh, and, convicting him under Sections $\frac{395}{109}$ of the Penal Code, we sentence him to be rigorously imprisoned for three years.

No. 16.

Before Mr. Justice Reid and Mr. Justice Robertson.

CROWN

Versus

MOHNA (*alias*) KOHARA.

Criminal Revision No. 1067 of 1900.

Robbery—Commission of grievous hurt in the course of a robbery—Penal Code, Sections 394, 397.

⁽¹⁾ I. L. R., XXI All., 263.

⁽²⁾ I. L. R., XVI All., 437.

Held, that the offence of voluntarily causing hurt of either description in committing or attempting to commit robbery is punishable under Section 394 of the Penal Code, Section 397 being merely a rider to Section 394, with reference to cases in which the hurt committed is grievous. *Queen-Empress v. Mahabir Tiwari* (1) followed.

Case reported by W. C. Renouf, Esquire, Sessions Judge, Ferozepore Division, on 10th August 1900.

The material facts of this case and the question referred for the decision of the Chief Court sufficiently appear from the following judgment delivered by

REID, J.—This reference and Criminal Revision 1068 of 1900 21st Feby. 1901. can be disposed of together. Narain and Mohna were found, by a District Magistrate, exercising powers under Section 30 of the Code of Criminal Procedure, to have attacked one Mehnga Kumhar, and robbed him of about Rs. 30, in cash, breaking one of his arms before robbing him. We have considered the evidence on the record and have no hesitation in holding that the prisoners robbed Mehnga, and that one or other of them broke one of his arms, thereby causing grievous hurt in the course of the robbery. The judgment of the District Magistrate runs as follows: "I find accused guilty, under 'Section 397, Indian Penal Code, and sentence each to three years' rigorous imprisonment, including three months' solitary confinement. The offence seems to me to have been committed more through devilment than anything else, and a heavier punishment 'is not necessary.'"

Here the Magistrate was obviously in error.

In the first place it has frequently been pointed out that the offence of voluntarily causing hurt of either description, in committing or attempting to commit robbery, is punishable under Section 394 of the Penal Code, Section 397 being merely a rider to Section 394 with reference to cases in which the hurt committed is grievous.

A robber, who causes simple hurt in the course of the robbery, may be punished under Section 394, with transportation for life, and Section 397 does not prescribe a separate or enhanced sentence; it merely prescribes a minimum sentence. The conviction should therefore have been under Section 394, Section 397 being entered in the charge sheet under that section. In the second place the provisions of Section 397 are obligatory "the imprisonment with which such offender shall be punished shall not be less than seven years." The words are very plain, and it is difficult to conceive how a

(1) I. L. R., XXI All., 263.

Magistrate, who took the trouble to read the section before passing sentence under it, could misunderstand them.

We concur with the learned Sessions Judge in the view that Section 34 of the Penal Code, read with Section 397, renders both the robbers liable to the minimum sentence under the latter section, although grievous hurt may have been caused by one only. *Queen-Empress v. Mahabir Tiwari* ⁽¹⁾ is in point.

We set aside the conviction and sentence, and convicting the prisoners Narain and Mohna under Section 394 of the Penal Code, we sentence them each, under Section $\frac{394}{307}$, to be rigorously imprisoned for seven years, including solitary confinement for three months.

⁽¹⁾ *I. L. R., XXI. All., 263.*

No. 17.

Before Mr. Justice Reid and Mr. Justice Chatterji.

FAKIR,—APPELLANT,

Versus

THE EMPRESS,—RESPONDENT.

} APPELLATE SIDE.

Criminal Appeal No. 791 of 1900.

Dying declaration.—On what charges admissible—Admissibility of dying declaration where the death of another person is the subject of the charge—Evidence Act, 1872, Section 32 (1).

A dying declaration is admissible only where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration; and the statement of a deceased person (who did not himself charge the accused with having wounded him) to the effect that another person who had died was stabbed by the accused, is inadmissible under the provisions of Section 32 (1) of the Evidence Act.

King v. Mead (1) and *Regina v. Hind* (2) followed.

Appeal from the order of Major E. Inglis, Sessions Judge, Peshawar Division, dated 20th August 1900.

Government Advocate for respondent.

The judgment of the Court was delivered by

REID, J.—This case has come before us on appeal and, under Section 374 of the Code of Criminal Procedure, for confirmation of the capital sentence passed on the appellant for the murder of Karim on the 14th May 1900.

5th Nov. 1900.

Appeals had not been filed by Abdul Rahman, Karim Dad or Karam, who were sentenced at the same trial to transportation for life, to rigorous imprisonment for two years and to rigorous imprisonment for one year, respectively, when this appeal was heard, although the period of limitation for appeals by them had expired, and we decided to proceed with this appeal.

The facts have been dealt with at considerable length by the learned Sessions Judge, and need not be repeated.

On the evidence we have no hesitation in holding that Karim, Said Malik and Feroz were killed in a fight with the appellant and his party, of whom Fazl Ahmad, brother of the appellant, was also killed. The assessors found that at the beginning of the quarrel there were present the appellant, Fazl Ahmad and Abdul Rahman on one side, and Karim, Said Malik, Feroz and Samandar on the other, and that Karim Dad joined Fakir's party later on, while Gulab, Zerdad and Mussammat Mehrmauji joined Karim's party.

(1) 2, B. and C., 605.

(2) 8, Cox., 300.

Counsel for the defence in the Court of Session declined to examine witnesses, and the only evidence on the record is that for the prosecution, which does not attempt to account for the death of Fazl Ahmad, except by the suggestion that he may have been killed by one of his own party.

The medical evidence is to the following effect :—

Karim was wounded in the abdomen, his intestines protruding ; Said Malik was wounded in the left lung with much bleeding in the left pleural cavity ; Feroz was wounded in the left forearm, death being caused by hæmorrhage from the axillary artery ; Fazl Ahmad was wounded in the back, through the 11th and 12th ribs, one of his kidneys being cut. The fight occurred at night in a dimly lighted *hujra*. There was a full moon that night, but we are not satisfied with the evidence of the witnesses examined for the prosecution as to who actually inflicted the fatal injuries on the deceased in the confusion caused by the fight.

The learned Sessions Judge accepted the dying declarations of Karim and Feroz, and held that the appellant stabbed Karim.

We note that Feroz did not die until the 2nd June, and that, in the last statement made by him, on the 30th May, before a Magistrate of the 2nd class, he said that Said Malik and Karim died from the effects of wounds, but that he could not say at whose hands in particular they received those wounds, all four accused, Fakir, Karim Dad, Abdul Rahman and Karam being present.

On a careful consideration of Section 32 (1) of the Evidence Act, of Stephen's *Digest of Evidence*, Article 26, of *King v. Mead* ⁽¹⁾, of *Regina v. Hind* ⁽²⁾, and of Taylor on *Evidence*, Edition 9th, Sections 714 and 716, we hold that the dying declaration of Feroz is not admissible against the appellant, who is not alleged to have wounded Feroz or to have done more than cause the death of Karim.

Had the case for the prosecution been that several men, including the appellant, attacked Feroz, a dying declaration by the latter, including the appellant among his assailants, although the appellant did not strike him, would doubtless be admissible on a charge of abetment against the appellant, but the charge against the latter did not include any offence committed against Feroz.

In Section 716 of Taylor on *Evidence* the following remarks are made :—

(¹) 2, B. and C., 605.

(²) 8, Coz, 300.

“The exception to the general rule against admitting hearsay evidence which is now under review, is restricted to cases of homicide, and is there recognized on the sole ground of public necessity. For, as in such cases it often happens that no third party was present as an eye witness to a murder and as the party injured, who is the usual witness in other cases of felony, cannot himself be called, it follows that, if his dying declaration could not be received, the murderer might often escape justice.”

To admit the dying declaration of Feroz against the appellant would be, in our opinion, to admit it in a case in which the cause of the death of Karim comes into question, the provisions of Section 32 (1) making it admissible only in the case in which the cause of the death of Feroz comes into question, and the fact that the alleged murderers of Karim and Feroz were tried jointly does not, in our opinion, extend the admissibility, the “cases” against each of the prisoners being as separate as are the charges against them.

The learned Government Advocate has not contended that the statements of Feroz are admissible against the appellant under any provision of the law other than Section 30 (1) of the Evidence Act, and we reject those statements as inadmissible against the appellant.

We see no reason to differ from the learned Sessions Judge in accepting so much of the dying declaration of Karim as attributed his injury to the appellant, but we are not satisfied that the appellant began the fight or that the fight began as described by Karim.

Fazl Ahmad was mortally wounded, although the Sessions Judge has omitted to place on the record evidence, which might have been of considerable importance, of the date of his death, and Feroz was only wounded on the arm, so that Karim had an object in representing his side to be blameless in the matter and to have been the victims of an unprovoked attack. The dying declaration of Karim, made a few hours before he died, was not recorded until at least twelve hours after the fight, in fact the police did not arrive on the scene until midday on the 15th May, after the death of Said Malik, and there was time for a story exonerating the deponent's party to be concocted. There is evidence, which has not been shaken, that the appellant produced two blood-stained knives from a well, and we see no reason to doubt that the appellant joined in the fight, armed with a knife, and caused the death of Karim. We reject the story that Karim originally implicated Zerdad.

The appellant has failed to prove that he acted in the exercise of the right of private defence of himself or of any other person, and we see no reason for interference with the conviction. Having regard, however, to the facts that the medical evidence proves that only one wound was inflicted on Karim, that the appellant is not proved to have commenced the fight, and that one at least of the other party was armed with a knife and killed Fazl Ahmad, (the learned Government Advocate admitted that the suggestion that Fazl Ahmad was killed by one of his own party could not be supported), the extreme penalty is not, in our opinion, called for, and we set aside the sentence, substituting for it transportation for life. To this extent only we allow the appeal.

No. 18.

Before Mr. Justice Reid.

MATHRA DAS,—PETITIONER,

Versus

RAJA AND OTHERS,—RESPONDENTS.

Criminal Revision No. 12 of 1901.

Criminal Procedure Code, 1898, Section 250—Compensation—Sanction to prosecute and award of compensation.

Held, that there is nothing in the terms of Section 250 of the Criminal Procedure Code, 1898, to show that it applies only to those cases in which sanction to prosecute for offences punishable under Sections 211 and 193 of the Penal Code would not be granted.

Adikkan v. Alagan ⁽¹⁾ followed. *Shib Nath Chong v. Sarat Chunder Sarkar* ⁽²⁾ and *Bachu Lal v. Jagdam Sahai* ⁽³⁾ dissented from.

Petition for revision of the order of T. J. Kennedy, Esquire, Sessions Judge, Rawalpindi Division, dated 5th December 1900.

Becchey, for petitioner.

Muhammad Shafi, for respondents.

The judgment of the learned Judge was as follows:

11th April 1901.

REID, J.—Counsel for the petitioner cites *Shib Nath Chong v. Sarat Chunder Sarkar* ⁽²⁾ and *Bachu Lal v. Jagdam Sahai* ⁽³⁾ as authority for the proposition that Section 250 of the Code of Criminal Procedure does not apply to cases in which a prosecution for perjury or preferring a false charge might be sanctioned, but applies only to petty cases in which sanction would be refused on the *de minimis* principle.

⁽¹⁾ I. L. R., XXI Mad., 237.

⁽²⁾ I. L. R., XXII Cal., 586.

⁽³⁾ I. L. R., XXVI Cal., 181.

The authorities cited deal with cases in which compensation was awarded and prosecution was sanctioned at the same time, and in *Adikkan v. Alagan* ⁽¹⁾, Collins, C. J., and Benson, J., differed from the opinion expressed in the XXII Calcutta case, and expressed the opinion that there is nothing in the terms of Section 560 of the late, corresponding with Section 250 of the present, Code of Criminal Procedure to justify the conclusion that a Magistrate, who grants sanction to prosecute for offences punishable under Sections 211 and 193 of the Penal Code, is *ipso facto* debarred from also granting compensation to the person falsely accused.

In XXVI Calcutta this was conceded, but the Court held that a Magistrate who adopted the course of awarding compensation and sanctioning prosecution would be exercising his discretion improperly.

I concur in the opinion expressed by the Madras Court, and the use of the words "frivolous or vexatious" in Section 250 of the Code refutes the argument that the Section applies only to cases in which sanction to prosecute would not be granted. If the false complaint had for its object the vexation of the person accused, Section 250 applies. Counsel for the petitioner has not attempted to suggest the class of false complaint with reference to which sanction to prosecute would not be granted, although compensation might be awarded.

On the merits the order for compensation cannot stand.

(The remainder of the Judgment is not material for the purposes of this report, ED., P. R.)

No. 19.

Before Mr. Justice Reid.

CROWN

Versus

MANNA SINGH AND ANOTHER.

Criminal Revision No. 453 of 1901.

Pardon—Withdrawal of pardon—Authority of Committing Magistrate to withdraw pardon legally tendered by a District Magistrate—Criminal Procedure Code, 1898, Section 339.

Held, that a Magistrate of the 1st class inquiring into an offence is not competent to withdraw a pardon tendered by a superior authority, the withdrawal should emanate from the authority which granted the pardon.

Queen-Empress v. Manick Chandra Surkar ⁽²⁾ followed —

REVISION SIDE.

(1) I L. R., XXI Mad., 237.

(2) I. L. R., XXIV Calc., 492.

*Case reported by T. Miller, Esquire District Magistrate,
Ferozepore, on 22nd March 1901.*

The case came before Mr. Justice Reid who passed the following order :—

17th April 1901.

REID, J.—In this case the pardon was tendered by a Magistrate of the 1st class with the sanction of the District Magistrate, such sanction being necessary, presumably, because the Magistrate of the 1st class was not inquiring into the offence. *Queen-Empress v. Manick Chandra Sarkar* ⁽¹⁾ is authority for the proposition that the withdrawal should emanate from the authority which granted the conditional pardon, and in this view the proper course for the Magistrate inquiring into the case was to refer the matter to the Magistrate of the district with a recommendation that the pardon be withdrawn.

Although a Magistrate of the 1st class inquiring into an offence can tender pardon, he is not, in my opinion, competent to withdraw a pardon tendered by superior authority, and in the present case the Magistrate of the district opposes the withdrawal. For these reasons, I set aside the order withdrawing pardon.

No. 20.

Before Mr. Justice Maude.

PIYARE LALL AND OTHERS,—PETITIONERS,

Versus

THE EMPEROR OF INDIA,—RESPONDENT.

Criminal Revision No. 257 of 1901.

REVISION SIDE. {

Criminal Procedure Code, 1898, Section 190 (1) (c)—Cognizance taken by a 2nd class Magistrate upon his own knowledge of a non-cognizable offence—Jurisdiction.

Held, that a 2nd class Magistrate cannot institute proceedings under Section 190 (1) (c) of the Code of Criminal Procedure upon his own knowledge or suspicion. The Punjab Government Notification No. 99, dated 3rd February 1883, only invests Magistrates of the 1st and 2nd classes with power to take cognizance of offences upon information and not on their own knowledge or suspicion.

Petition for revision of the order of B. H. Bird, Esquire,

District Magistrate, Rohtak, dated 15th October 1900.

Muhammad Shafi, for petitioners.

The judgment of the learned Judge was as follows :—

18th April 1901.

MAUDE, J.—In this case four persons were convicted under Section 160 of the Indian Penal Code of the offence of committing an affray, the convicting Magistrate being a Magistrate of the

⁽¹⁾ *I. L. R., XXIV Cal., 492.*

2nd class, and Tahsildar of Gohana. From the judgment it appears that while the Tahsildar was holding his Court a disturbance was created by certain persons inside the *tahsil* court-yard, and the record shows that the Tahsildar took down the statements of certain persons, and after a reference to the Deputy Inspector of Police, the petitioners and others were summoned by the Tahsildar for committing an offence under Section 160, Indian Penal Code, and the four petitioners were convicted. On appeal to the District Magistrate one of the points raised was that the Tahsildar, being a 2nd class Magistrate, could not institute proceedings under Section 190 (1) (c) of the Code of Criminal Procedure. The District Magistrate, however, held that Punjab Government Notification No. 99, dated February 3rd, 1883, empowered 2nd class Magistrates to take cognizance of offences "on receiving *itilayâbi juraim*," and that that expression included knowledge and suspicion also. It is now contended that the District Magistrate's view is erroneous, and that the Tahsildar Magistrate's proceedings were null and void. This contention must in my opinion prevail. Section 191 of Act X of 1832 (now Section 190 of Act V of 1898) authorized any Presidency Magistrate, District Magistrate, Sub-Divisional Magistrate and any other Magistrate specially empowered in this behalf to take cognizance of any offence. . . . (c) "upon information received from "any person other than a Police officer, or upon his own knowledge "or suspicion, that such offence has been committed." The Notification of the Punjab Government above cited invested all Magistrates of the 1st and 2nd classes (now standing appointed or who may hereafter be appointed) with power "to take cognizance of "offences upon information," but the Notification is silent as regards "knowledge or suspicion." It is clear that there is a very real distinction between "information received by a Magistrate" from another person, and "his own knowledge or suspicion," that an offence has been committed, and it is a misuse of language to hold that the former expression includes the latter. Nor is there any difficulty in understanding that the Government though willing to empower Subordinate Magistrates to take cognizance of offences upon information received from others, should decline to invest them with the power in regard to offences of which their own knowledge or suspicion would be reason for taking action. As therefore the Tahsildar took cognizance of this case upon his own knowledge, without having been empowered by law to do so, his proceedings must be held to be void under Section 530 (k) of the Code of Criminal Procedure, and must accordingly be set aside.

Application allowed.

No. 21.

Before Mr. Justice Clark, Chief Judge.

DAD,—PETITIONER,

Versus

THE EMPEROR,—RESPONDENT.

Criminal Revision No. 539 of 1901.

REVISION SIDE. {

Perjury—Contradictory statements by witness—Penal Code, Section 193.

Where the statements of an uninterested and ignorant witness were in main to the same effect and the contradiction was only in detail and where on the view as taken by the Sessions Judge it was apparent that the latter statement was a reversion to the truth from an original false statement, *held*, that ordinarily it would be inadvisable to order a prosecution for perjury under such circumstances as it compels a witness to adhere to his original lie under penalty of a prosecution if he tells the truth.

Santa Singh v. Queen-Empress (1) cited.

Petition for revision of the order of Maulvi Inam Ali, Sessions Judge, Sialkote Division, dated 3rd May 1901.

Shelverton, for petitioner.

The judgment of the learned Chief Judge was as follows:—

11th May 1901. CLARK, C. J.—In the case *Mussammatt Har Deri v. Ahman*, rape, Section 376, Indian Penal Code, Dad, witness before the Tahsildar Magistrate on 18th December 1900, said he saw both these persons naked, and gave other evidence in support of the rape.

On 28th February 1901, before the District Magistrate, he stated that he did not see them naked, but the rest of his evidence was in support of the rape, he said the woman's sheet was torn, and besmeared with mud.

The District Magistrate when Dad had given this evidence, passed the following order for his prosecution, under Section 193, Indian Penal Code. "He stated before the Tahsildar on the 18th that he saw the man and woman naked. He says before me that he did not see anything of the kind, a contradictory statement."

Ahman was convicted for attempt at rape and sentenced to 3½ years' imprisonment by the District Magistrate.

Dad has been tried for perjury, the Magistrate charged Dad in the alternative, and convicted him of making a false statement, holding his statement before the District Magistrate to be the false one, he sentenced him to six months' imprisonment and Rs. 10 fine.

On appeal, the Sessions Judge held the statement before the Tahsildar Magistrate to be the false one and the statement before the District Magistrate to be true, he says: "The accused is however an ignorant old peasant, and it may be that his memory misled him. Having regard to the fact that he was the last of the four witnesses who reached the spot on hearing the woman's cries, it may be that by the time he reached, the accused and the complainant were covering themselves, or had partly covered themselves, especially as he said that he had heard the cries at a distance of 40 *karams*. If so the accused came to the right side before the District Magistrate after having given a false statement before the Tahsildar," he reduced the sentence to three months' rigorous imprisonment.

If the Sessions Judge thought that the contradiction was due to Dad's memory misleading him, he should have acquitted him, as no perjury had in that case been committed.

It seems to me that the Courts have not in this case taken an intelligent and broad view of what should be considered in dealing with a case of perjury.

In *Santa Singh v. Queen-Empress* (1) it was pointed out that in order to properly adjust the punishment it is necessary to enter into the circumstances of the case, the object with which the perjury was committed, and, if possible, to determine which of the two contradictory statements was false.

The Courts in this case have given their findings as to which statement was probably false, but have not considered the other matters referred to.

Ahman was convicted of attempt to rape, so the substance of Dad's evidence, which supported the rape, was presumably true. No reason appears why Dad should have wished either to shield Ahman or to press the case against him.

He is a Virk zamindar, age 50, a man apparently of no education or special intelligence.

Such persons from want of accuracy of thought are apt to mix up what they have actually seen themselves with what other persons have actually seen, and with what they believe to have occurred.

Dad is recorded before the Police as having made a third different statement saying that he actually saw Ahman lying on the woman. The probability seems to be, that as Dad came up late, he did not really see the details, but he believed that the

(1) 3, P. R., 1899, Cr.

rape had been attempted, and on the different occasions inaccurately spoke of having seen things that he had heard from the other witnesses, and believed to have occurred.

Even if such evidence comes within the definition of giving false evidence under Section 191, Indian Penal Code, it is not a kind of false evidence that, in a country like this, saturated with deliberate and interested false evidence, should be prosecuted.

The punishment of Dad on the view of the case taken by the Sessions Judge that the later statement was a reversion to truth from an original false statement is calculated to have a bad effect on the administration of justice. It nails a witness to his original lie, under penalty of a prosecution for perjury if he tells the truth, and ordinarily it would be inadvisable to order a prosecution for perjury in such circumstances.

I am not satisfied that Dad knew or believed his statement to be false, or did not believe them to be true. I set aside the conviction and discharge Dad.

Application allowed.

No. 22.

Before Mr. Justice Reid.

CROWN.

Versus

NURA AND OTHERS.

Criminal Revision No. 55 of 1901.

Criminal Procedure Code, 1898, Section 106—Recognizance to keep peace—Stage of proceedings of which order should be passed.

A second class Magistrate found the accused guilty of assault and sentenced them to a fine of Rs. 10 each, or simple imprisonment for one month, provided that the sentence should not be carried out in the event of the convicted persons being bound over to keep the peace by the District Magistrate to whom he referred the case. The District Magistrate thereupon ordered the accused to furnish security of Rs. 100 for a period of six months, and remitted the fine.

Held, that the order of the District Magistrate to furnish security for keeping the peace was bad in law, inasmuch as it is a condition precedent to such an order that it should be made at the time of passing sentence by the original Court or by the Magistrate of the District, or on confirmation by the latter as an Appellate Court, of at least part of the sentence.

REVISION SIDE. }

Case reported by Captain G. C. Beadon, Sessions Judge, Jullundur Division, on 2nd Jaunary 1901.

The facts of this case were as follows :—

The accused were sentenced to Rs. 10 fine each under Section 323, Indian Penal Code. The District Magistrate to whom the Tahsildar referred the case, remitted the fines and ordered the accused to furnish securities of Rs. 100 each.

The accused, on conviction by Captain F. E. Bradshaw exercising the powers of District Magistrate in the Jullundur District, were sentenced, by order, dated 13th September 1900, under Section 106, Criminal Procedure Code, and Section 323 of the Indian Penal Code, to furnish securities of rupees one hundred each.

The proceedings were forwarded for revision on the following grounds :—

In this case the Tahsildar Magistrate of the 2nd class found Nura and Maula guilty of an assault. The section of the Indian Penal Code applicable to the offence is not given in the judgment, but as no charge was framed the conviction must be taken to have been under Section 352, Indian Penal Code. There is a third accused person Ghulam Muhammad who was acquitted, and the case, as far as he is concerned, need not be further considered.

The order of the Tahsildar in respect of the sentence of Nura and Maula was to the following effect. Each was sentenced to a fine of Rs. 10, or simple imprisonment for one month in default of payment. It was, however, provided that this sentence should not be carried out in the event of the convicted persons being put on security for keeping the peace by the District Magistrate to whom the case was referred.

On this reference the District Magistrate ordered the convicted persons to find security of Rs. 100 for a period of six months, and remitted the fine.

The section of the Criminal Procedure Code, under which the reference to the District Magistrate was made is not stated in the Tahsildar's order, nor did the District Magistrate quote the section of the Criminal Procedure Code, or Indian Penal Code, under which his order was passed. Moreover, it was not expressly provided in the District Magistrate's order whether the security was for keeping the peace or for being of good behaviour. It is, however, evident that the District Magistrate was not acting as a Court of Appeal and, considering the reasons given by the Tahsildar for his reference to the District Magistrate, it is also evident

that the reference and order of the District Magistrate were not under Sections 562 and 380, Criminal Procedure, Code.

The sections under which the District Magistrate and Tahsildar appear to have acted are Sections 349 and 106, Criminal Procedure Code. This being the case the Tahsildar Magistrate was wrong in passing any sentence whether conditional or otherwise. He could record his opinion as to what the sentence should be, but under Section 349 (2) it was for the District Magistrate alone to decide what sentence or other final order should be passed. As, however, a final order has been passed by the District Magistrate which makes the conditional sentence by the Tahsildar void this irregularity on the part of the Tahsildar is not material.

The point for decision is whether the District Magistrate acting under Section 106, Criminal Procedure Code, can order security to be furnished in lieu of any other punishment, or must such security order be in addition to an order awarding punishment specially provided for the offence.

In an appeal decided by the District Magistrate, Jullundur, on the 28th August 1900, *Khairati, &c., v. Crown*, a conviction under Section 323, Indian Penal Code, was upheld, but the sentence of fine was altered to an order requiring security in lieu thereof.

A petition for revision was rejected by me on 13th October 1900, on the ground that an Appellate Court could order security under Section 106, Criminal Procedure Code, and could reduce a sentence under Section 423, Criminal Procedure Code. On further consideration, however, I am of opinion that this decision was wrong. Section 106, Criminal Procedure Code, provides that the order requiring security can be made "at the time of passing sentence" which appears to mean that the order for security is altogether separate from the sentence for the offence, and, except when a sentence is being passed, no order for security can apparently be made under Section 106, Criminal Procedure Code. The sentence is apparently that part of the judgment (*vide* Section 367 (2), Criminal Procedure Code) by which punishment to the offender is awarded and, unless by any special law, *e. g.*, Whipping Act, a punishment is provided which can be awarded in lieu of a punishment provided by the Indian Penal Code, a person convicted under the Indian Penal Code, must be punished with one or another of the kinds of punishment described in Section 53. Indian Penal Code.

The furnishing of security is not described as a punishment in Section 53, Indian Penal Code, and Section 106, Criminal Pro-

cedure Code, does not provide that it may be substituted for such punishment.

For these reasons, I have come to the conclusion that the District Magistrate's order is illegal and, though in the present case, I think a nominal fine in addition to the security is all that is necessary, the point is a doubtful one which requires a final decision.

Nura and Maula, the convicted persons, merely state that they were not guilty, but they put forward no objection to a reference to the Chief Court. I accordingly report the case to the Chief Court for orders as, until this point is definitely settled, there will be no end to petitions for revision similar to this one.

The case came before Mr. Justice Reid who passed the following order :—

REID, J.—Notice to the Magistrate of the District to show cause why the order demanding security from Nura and Maula should not be set aside. 30th Jan'y. 1901.

I concur with the learned Sessions Judge in holding that the order must be treated as having been passed under Section 106, and that the reference by the Magistrate of the 2nd class to the Magistrate of the District must be treated as having been under Section 349 of the Code of Criminal Procedure. As remarked by Mr. Henderson, in his notes to that Code, Section 106 is precise as to the order being made at the time of passing sentence by the original Court; and sentence by the Magistrate of the District, or confirmation by him as an Appellate Court, of at least part of the sentence, is a condition precedent to an order under Section 106 by him.

No cause being shown, the final order of the Chief Court was passed by

REID, J.—No cause being shown, this order is made absolute. 21st May 1901. For reasons recorded on the 30th January 1901, the order demanding security from Nura and Maula is set aside. The securities will be discharged.

No. 23.

Before Mr. Justice Maude.

ATMA RAM,—PETITIONER,

Versus

THE EMPEROR,—RESPONDENT.

Criminal Revision No. 601 of 1901.

REVISION SIDE. {

Sanction to prosecute—Criminal Procedure Code, 1898, Sections 195, 476
—Sanction by a Court upon its own motion—Complaint.

Under the provisions of Section 195 of the Criminal Procedure Code Court may either sanction the institution of criminal proceedings by a private individual or may itself prefer a complaint the procedure for preferring which is laid down in Section 476 of the Code; therefore where during the hearing of a Civil case the petitioner filed a certificate signed by a Civil Surgeon to prove his age, the Court believing the certificate to have been tampered with recorded a sanction under Section 195 of the Criminal Procedure Code on its own motion as it suspected that either the offence of forgery (Section 463) or that of using as genuine a forged document (Section 471), Indian Penal Code, had been committed.

Held that the sanction was bad in law, as it had not been granted to a private prosecutor, nor had the procedure laid down in Section 476 been adopted.

Queen-Empress v. Rachappa and Irappa (1) cited.

Petition for revision of the order of A. C. Hurry, Esquire, Sessions Judge, Umballa Division, dated 17th April 1901.

K. C. Chatterji, for petitioner.

The judgment of the learned Judge was as follows :—

22nd June 1901.

MAUDE, J.—The learned Sessions Judge in his order, dated April 17th, 1901, set forth certain facts regarding a certificate of age, which had been produced in his Court, and then he continued :
 “there is therefore reason to suspect that the offence of forgery,
 “Section 463, or using as genuine a forged document, Section 471,
 “Indian Penal Code, has been committed by Atma Ram in regard
 “to that certificate. Sanction is accordingly given hereby for
 “the prosecution of Atma Ram for the offences noted above or
 “for any offence arising out of the same facts.” The order is
 headed “Sanction under Section 195, Criminal Procedure Code.”

It is contended on behalf of Atma Ram that this order is *ultra vires*, not being one contemplated by Section 195 of the Code of Criminal Procedure. Clause (1) (c) of that section precludes a Court from taking cognizance of offences such as those referred

(1) *I. L. R., XIII Bom.*, 109.

to by the Sessions Judge "except with the previous sanction, or on "the complaint of " certain Courts. The meaning of these words is that a Court may either sanction a private person instituting criminal proceedings, or may itself prefer a complaint, but if the latter course be adopted, there is ample authority for the view that the Court preferring the complaint should follow the procedure laid down in Section 476 of the Code, and the proceedings taken under this section will constitute the "Complaint" of the Court referred to in Section 195. The question is fully discussed in the cases of *Queen-Empress v. Rachappa* and *Queen-Empress v. Irappa* ⁽¹⁾ by a Bench of the Bombay High Court, and the decisions of other High Courts to the same effect are therein cited.

In the present case the sanction has not been given to a private person, nor has the procedure laid down in Section 476 been followed, and the order of the Sessions Judge is therefore not one contemplated by the Code. The order is accordingly set aside, and if further proceedings are considered necessary the remarks made above should indicate the nature of the procedure to be observed.

Application allowed.

Full Bench.

No. 24.

*Before Mr. Justice Clark, Chief Judge, Mr. Justice Reid, Mr.
Justice Chatterji, Mr. Justice Robertson, Mr. Justice
Harris, and Mr. Justice Maude.*

LAKHMI CHAND,—PETITIONER,

Versus

THE EMPEROR,—RESPONDENT.

} REVISION SIDE.

Criminal Revision No. 224 of 1901.

Jurisdiction—Jurisdiction of Special Magistrate appointed under the provisions of Section 14 of the Code of Criminal Procedure—Local area, meaning of—Omission to define area, effect of—Criminal Procedure Code, Sections 14 and 537.

The petitioner, who had been convicted on a charge of misappropriation under Section 409 of the Penal Code, contended that his conviction was illegal, as Mr. Rennie, the Special Magistrate, who had been appointed by the following Notification. "In modification of Notification No. 1672A, dated "the 20th of November 1900, and under Section 14 of the Criminal Procedure Code (Act V of 1898) the Honorable the Lieutenant-Governor is pleased "to appoint and hereby does appoint Mr. J. G. M. Rennie, Divisional Judge,

(1) I. L. R., XIII Bom., 109.

"who has been posted temporarily to Rawalpindi a Special Magistrate of the 1st class for a term of three months with power to try all such cases as may be instituted in his Court on the complaint of the Commissary-General of the Punjab Command, or of any other officer of the Commissariat Department, or having been already instituted on such complaint in any other Court may be transferred to his Court, and under Section 50 of the said Code the Honorable the Lieutenant-Governor invests Mr. J. G. M. Rennie with power to try as such Magistrate all offences not punishable with death," had no jurisdiction or authority to try him, as Section 14 of the Criminal Procedure Code did not empower the Local Government to confer on any Magistrate jurisdiction over an area of a larger extent than a district, and that inasmuch as no local area was specified in the Notification Mr. Rennie had no jurisdiction to try the case.

The point referred for the opinion of the Full Bench was:

Had Mr. J. G. M. Rennie jurisdiction to try the petitioner on a charge of misappropriation under Section 409 of the Penal Code, the offence being alleged to have been committed at Kai?

Held, by the Full Bench (Reid and Maude, JJ., dissenting) that Mr. Rennie had been invested with jurisdiction to try the case.

Per Clark, C. J., Robertson and Harris, JJ., that the Notification conferred jurisdiction throughout the Punjab by necessary implication, and that Mr. Rennie had jurisdiction to try the case.

Per Chatterji, J., that Mr. Rennie's appointment was not invalid on the ground that no local area was mentioned in the Notification which was capable of being interpreted to confer local jurisdiction in the district of Rawalpindi, and that Kai (the place where the offence was committed) was beyond his local jurisdiction, but that this did not involve the consequence that his proceedings were void for want of jurisdiction in the true sense of the word.

Per Reid and Maude, JJ., that the Notification appointing Mr. Rennie a Special Magistrate was radically defective by reason of the omission to define an area of jurisdiction, and that his proceedings were therefore null and void.

Petition for revision of the order of T. J. Kennedy, Esquire, Sessions Judge, Rawalpindi Division, dated 11th February 1901.

Grey and Mul Chand, for petitioner.

Legal and Assistant Legal Remembrancers, for respondent.

The point of law involved was referred to a Full Bench by the following order of the Divisional Bench (Reid and Maude, JJ.):—

25th May 1901.

REID, J.—The petitioner was convicted by Mr. J. G. M. Rennie, sitting as a Special Magistrate at Rawalpindi, of an offence punishable under Section 409 of the Penal Code, committed at Kai, apparently in the Kohat District, and was sentenced to rigorous imprisonment for two years, including solitary confinement

for three months and to a fine of Rs. 10,000 or, in default of payment, to further rigorous imprisonment for one year.

The powers conferred on Mr. Rennie were notified in the *Punjab Government Gazette* as follows:—

“The 29th November 1900, No. 1729, *Powers*.—In modification of Notification No. 1672 A, dated the 20th of November 1900, and under Section 16 of the Criminal Procedure Code (Act V of 1898) the Hon’ble the Lieutenant-Governor is pleased to appoint, and hereby does appoint, Mr. J. G. M. Rennie, Divisional Judge; who has been posted temporarily to Rawalpindi, a Special Magistrate of the 1st class for the term of three months with power to try all such cases as may be instituted in his Court on the complaint of the Commissary-General of the Punjab Command, or of any other officer of the Commissariat Department, or, having been already instituted on such complaint in any other Court, may be transferred to his Court, and, under Section 30 of the said Code, the Hon’ble the Lieutenant-Governor invests Mr. J. G. M. Rennie with power to try, as such Magistrate, all offences not punishable with death.”

The Notification superseded by this Notification differed from the latter only in that it did not contain the words between “Punjab Command” and “and under Section 30 of the said Code.” The application for revision is based on various grounds, the first being that the omission to specify the local area within which the powers conferred shall be exercised deprives the Notification of all effect, the result being that the Special Magistrate had not jurisdiction to try the petitioner. The point is novel and of considerable importance, and should, in our opinion, be decided by a Full Bench of the Court.

Under Section 11 of the Punjab Courts Act, we refer to a Full Bench of the Court the following question:—

Had Mr. J. G. M. Rennie jurisdiction to try the petitioner on a charge of misappropriation under Section 409 of the Penal Code, the offence being alleged to have been committed at Kai?

The judgments delivered by the learned Judges who constituted the Full Bench were as follows:—

HARRIS, J.—The point referred depends upon a consideration of the questions whether Mr. Rennie was, under the Notification of the 29th November 1900, given powers as a Special Magistrate in any, and, if so, what, “local area” under Section 14, Act V of 1898. 8th June 1901.

I consider the "local area" of Section 14 is not restricted to the meaning of the same term in Section 12 in which the words appear to contemplate some area within a district. The term "local area" occurs in other sections of the Code, *e.g.*, Sections 40, 182 and 531. Section 40 (by implication) and Section 531 (directly) refer to local areas which may be more than a district, and in the latter section there is a reference to the territorial divisions of Sections 7 and 8 which territorial divisions include a Province. In *Punardeo Narain Singh v. Ram Sarup Roy* (1) it seems to have been held that "local area" might include a whole Province, and in my opinion a Local Government may confer powers under Section 14 for the whole province (outside presidency towns) under its administration as a "local area."

Next, I think it is incumbent upon a Local Government conferring powers under Section 14 to define directly or by necessary implication, the "local area" within which the Special Magistrate is to exercise those powers.

I do not consider the words "who has been posted temporarily to Rawalpindi" to mean more than that Mr. Rennie was to hold his Court there. The words certainly cannot be construed as defining the "local area," whether of Rawalpindi city, civil lines, cantonment or district, within which the powers conferred were to be exercised. Hence, we must refer to the other words of the Notification to see if any local area is defined. Thereunder Mr. Rennie was given "power to try all such cases as may be instituted in his Court on the complaint of the Commissary-General of the Punjab Command, or of any other officer of the Commissariat Department."

The drafting of the Notification was evidently careless, for the above ^{for} cases might include cases, *e.g.*, of an assault upon a Commissariat Officer at any place in the Punjab, or even at Timbuctoo the trial of which by Mr. Rennie was evidently not contemplated. But where a Local Government confers powers over a local area which is partly in the province and partly outside, there would, I think, be no difficulty in holding the powers conferred to be good for that part of the local area which is within the province, the greater including the less both as regards area and class of case.

I am of opinion that the words: "all such cases, &c.," cited above from the Notification must refer to all cases instituted by Commissariat Officers as would be ordinarily triable in the pro-

(1) *I. L. R.*, XXV Calcutta, 858.

vince of the Punjab, and that by necessary implication that province is defined as the local area.

The above construction does not, I consider, import any matter omitted by the Notification, as the actual words certainly do not convey anything less.

The trial of a person charged with an offence under Section 409, Indian Penal Code, committed at Kai, in the Kohat District of the Punjab Province would, assuming the case was instituted by a Commissariat Officer, be one of the cases and within the local area contemplated by the Notification.

I am thus of opinion, on the above assumption, that Mr. Rennie had jurisdiction.

MAUDE, J.—The petitioner was convicted, under Section 409 of the Indian Penal Code, by Mr. J. G. M. Rennie, who described himself in his judgment as a "Special Magistrate." Mr. Rennie's power to try the case against the petitioner is admittedly only derived from the following Notification No. 1729, dated November 29th, 1900, issued by the Punjab Government:—

9th June 1901.

"Powers.—In modification of Notification No. 1672 A, dated the 20th November 1900, and under Section 14 of the Criminal Procedure Code (Act V of 1898), the Hon'ble the Lieutenant-Governor is pleased to appoint, and hereby does appoint, Mr. J. G. M. Rennie, Divisional Judge, who has been posted temporarily to Rawalpindi, a Special Magistrate of the 1st class, for a term of three months, with power to try all such cases as may be instituted in his Court on the complaint of the Commissary-General of the Punjab Command, or of any other officer of the Commissariat Department, or having been already instituted on such complaint in any other Court, may be transferred to his Court, and under Section 30 of the said Code the Hon'ble the Lieutenant-Governor invests Mr. J. G. M. Rennie with power to try as such Magistrate all offences not punishable with death." The first clause of Section 14 of the Code of Criminal Procedure enacts that "The Local Government may confer upon any person all or any of the powers conferred or conferable by or under this Code on a Magistrate of the first, second or third class in respect to particular cases or to a particular class or particular classes of cases, or in regard to cases generally, in any local area outside the presidency towns." Clause (2) provides *inter alia* that such Magistrates shall be called "Special Magistrates." The contention raised on behalf of the petitioner is that the omission in the Notification to specify or define any "local area" in which the

Special Magistrate was to exercise jurisdiction deprived the Notification of all effect, with the result that Mr. Rennie tried the petitioner not being empowered by law on that behalf, and that therefore under Section 530 of the Code his proceedings are null and void. For the Crown, on the other hand, it is argued that inasmuch as the Notification does not restrict or limit the exercise of the Special Magistrate's powers to any specified locality, therefore his jurisdiction must be held to have been coterminous with the area under the administration of the Local Government.

There can, I apprehend, be no question but that the scheme of criminal administration embodied in Act V of 1898 regards the district as the general unit for purposes of magisterial jurisdiction. Under Sections 7 and 10 every province must consist of a district or of districts, and in every district there must be a District Magistrate. Under Section 12 as many Magistrates as it is considered fit may be appointed in each district, whose jurisdiction and powers, unless specially limited, extend throughout the district for which they are appointed. Then as regards place of inquiry or trial, Section 177 provides that every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed. That is to say, the law contemplates that as a general rule offences tried by Magistrates shall be disposed of in the districts in which they are committed. Section 14 empowers the Local Government to depart from the general rule, and to appoint Special Magistrates with powers to be specified, in respect of particular cases, classes of cases or cases generally *in any local area*, that is without regard to the limits of districts. But whether the appointment of a Magistrate be made within a district or under Section 14, it is, I think, essential that three matters should be rendered absolutely clear, (1) who is the person appointed, (2) what are his powers, and (3) what is the area in which he can exercise them. If any one of these matters be left undetermined, I do not see how there can be any valid appointment. The question then is whether the Notification above set out can be said to fulfil each of these three conditions. As regards the first and second, a reply may be given in the affirmative, but as regards the third, after the fullest consideration, I feel compelled to return a different answer. It is of course a perfectly reasonable contention, and one which appears to be indisputable that the expression "local area" as used in Section 14 of the Code is wide enough to permit of the inclusion of the whole province in the jurisdiction of a Special Magistrate, but the further proposition advanced by the learned Legal Remembrancer, that if

no area is specified, it must be held that the jurisdiction is as wide as the Local Government could make it, that is extending throughout the province, does not appear to me to be equally tenable. Although the appointment of a Special Magistrate with a wide range of jurisdiction does not create a new species of jurisdiction differing essentially from that exercised by Magistrates within the limits of districts, still such an appointment sets in motion a special machinery not employed in the ordinary criminal administration, and one which should be brought into existence only in strict conformity with the directions of the law. When therefore the value of a Notification issued by the Local Government under the provisions of the section in question has to be considered, it appears to me that its meaning must be interpreted with even greater strictness than would be demanded in the case of the Criminal law itself. In this connection I may cite the remarks of their Lordships of the Privy Council in the case of *Nga Hooing v. The Queen* (1), in which the question was whether a certain Court had jurisdiction to try an offender. "There is nothing more clear than that, with respect to the Criminal law, the construction 'is always to be strict' 'we are not in any way 'to alter or construe differently the rules of the Criminal law in 'consequence of the supposed justice of a particular case. The rule 'is that such law is to be strictly construed.' If then the Statute law itself must be so construed, where the legislature delegates to some subordinate authority the power to confer jurisdiction on any persons whom it may appoint, in respect of all, or such offences as it may select, and within such areas as it may define, it appears to be still more essential that the language conferring such jurisdiction shall be clear and unambiguous. If it is not of this character, there is a serious defect, which in my view can only be supplied, provided it can be held that although the jurisdiction has not been given in express terms, it is conferred by plain and necessary implication. And here I would guard against being thought to assent to the proposition which I understand the learned Legal Remembrancer to have advanced, namely, that the Notification issued by the Local Government must have some meaning, and that it is for the Court to interpret what that meaning is. It is no doubt an axiom of English law that it is the business of the Courts when interpreting statutes to make sense of ambiguous language, and not to treat it as unmeaning, for it is a cardinal principle of construction that a statute is not to be treated as void. But I am not aware of any authority for the view that similar treatment

(1) 7, Moo's I. A., 72.

should be extended to the proceedings of local authorities purporting to apply the provisions of a statute. I, of course, concede that the Notification in question was intended to have some meaning, but the question for our determination is, not, generally, what was the intention, but what is the intention expressed *by the words actually used*.

The Notification is silent as regards the local area in which jurisdiction is conferred, it is also silent as to the nature or number of the cases to be instituted, and as to the part of the province in which they might be expected to arise. The expression "all such cases" I can only interpret as referring to the nature of the offences in respect of which complaints might be made, that is to say, as placing no restrictions on the *kind* of offence to be complained of: the words cannot, in my opinion, be explained as having any relation to the place in which cases may have arisen. Although it is not specifically stated, it would seem that the Special Magistrate was to hold his Court at Rawalpindi, a place not possessing, so far as I am aware, any special facility for the trial of offences committed generally throughout the Punjab. The Commissary-General of the Punjab Command is mentioned as one of the officers who may institute proceedings, and he is an officer whose headquarters, according to the official Army List, are at Murree which is near Rawalpindi, while possibly during the winter months he might be expected to be found in Rawalpindi. The mention of the Commissary-General therefore does not in any way necessarily suggest that jurisdiction was intended to be conferred on the Special Magistrate throughout the Punjab Command, which again includes an area not coterminous with the civil province, for Delhi is not in the Punjab Command. The term for which the Special Magistrate was appointed is three months, a period *prima facie* too limited to permit of his trying any large number of cases arising generally throughout the province. Can it then be held by any recognized rule of construction that the language of this Notification is so clear and unequivocal, that the plain and necessary implication is that jurisdiction was conferred throughout all British territory under the control of the Government of the Punjab? My opinion is distinctly opposed to such a finding, unless we can fall back upon and accept the argument put forward on behalf of the Crown, namely, that inasmuch as no local area has been defined, the jurisdiction conferred must be held to be as wide as it was competent to the Local Government to confer. This is a doctrine in support of which no authority of the Indian or any other Courts has been adduced, and the accept-

ances of which might readily be productive of embarrassment to the Courts and of injustice to those brought into contact with them. In India, in almost every branch of the civil administration, a very large number of persons exercise various powers in virtue of Notifications, or other orders issued under the authority of legislative enactments, and it is easy to see what difficulties and inconveniences may arise if such powers are not conferred in strict conformity with the requirements of the law. The expression "local area" is one well known to the Indian Statute-book, and there are numerous enactments which provide either for the extension of particular acts to such areas, or for the investiture of certain persons or bodies with powers within such areas. To hold that the operation of an Act or the exercise of powers under an Act, shall, in the absence of any definition of an area within which that Act shall take effect or those powers be used, be valid throughout the widest area to which a Local Government could extend it, or confer them, would necessitate the recognition of a laxity of procedure which might lead to much confusion and embarrassment. For example, in one of the very cases dealt with by the Special Magistrate appointed under the Notification in question, the offence was alleged to have been committed at Ferozepore; the trial was commenced at Ferozepore, but was completed at Rawalpindi, and ended in the conviction of the accused who appealed to the Sessions Judge of Rawalpindi, who entertained and decided the appeal. The question at once suggests itself, had the Sessions Judge of Rawalpindi jurisdiction to hear an appeal, in a case arising at Ferozepore, and tried by a Magistrate who according to the theory of the prosecution was a Special Magistrate in the Ferozepore District; who as such, under Section 17 of the Code of Criminal Procedure, was subordinate to the District Magistrate of Ferozepore, and from whose order convicting an accused person presumably an appeal would have lain to the Sessions Judge of Ferozepore. I am aware that a similar difficulty as regards the course of appeal might possibly have been supposed to exist had the Government Notification explicitly defined the local area of the jurisdiction of the Special Magistrate, but in that case the appellant would have known that the Magistrate had jurisdiction over an offence committed in the Ferozepore District, and should have had no difficulty in deciding in what Court to lodge his appeal; at any rate the Sessions Judge of Rawalpindi would have had some definite material on which to determine whether he had jurisdiction to hear the appeal. The course of appeal in this particular instance is a matter with which we are not now concerned, except that it seems to me to furnish a concrete argument in favour of

the view that the greatest care should be exercised when it is sought to make use of the somewhat exceptional powers conferred by Section 14 of the Code of Criminal Procedure. That, however, is only one of many instances which occur to me in which a departure from the rule of strict interpretation may entail unforeseen consequences. The sections of the enactments marginally noted indicate the kind of difficulty

Section 28, Punjab Courts Act, 1884.

Section 3, Indian Factories Act, XV of 1881.

Section 1, Prevention of Cruelty to Animals Act, XI of 1890.

Section 12, Births, Deaths and Marriages Registration Act, VI of 1886.

which may not unreasonably be expected to arise unless due attention is paid to the provisions of the law regarding the exercise of jurisdiction within local areas or limits. For these reasons, therefore, I cannot but hold that the Notification appointing Mr. Rennie a Special Magistrate was radically defective from the omission to define an area of jurisdiction, and in my opinion his proceedings as a Magistrate acting in virtue of that Notification must be considered null and void. I have not overlooked the fact that the adoption of my view will entail much inconvenience, but as was observed by the Bombay High Court in the case of *Queen-Empress v. Mangal Tek Chand* ⁽¹⁾ "inconvenience must follow whenever judicial appointments are not made in accordance with the essential provisions "of the statute creating the office."

10th June 1901.

CLARK, C. J.—I am unable to agree in the conclusion arrived at by my learned brother Maude.

I agree with him that the "local area" in Section 14 of the Criminal Procedure Code, is wide enough to permit of the inclusion of the whole province in the jurisdiction of a Special Magistrate.

Therefore, if the words "throughout the Punjab" had been added to the Notification, this difficulty about the jurisdiction would not have arisen.

The question is, whether these words can and should be implied in the Notification. The Notification gives "power to try "all such cases as may be instituted in his Court on the complaint "of the Commissary-General of the Punjab Command, or of any "other officer of the Commissariat Department, &c."

A Notification drawn up in these general terms seems to me faulty, and calculated to lead to difficulties, but I am not prepared to hold that it confers no jurisdiction. The words "all

(1) *L. R., X Bom.*, 263.

“cases” are sufficient to include every case that may be instituted, which has been committed throughout the Punjab.

It is true that they would include also cases committed beyond the Punjab, but there is no danger of difficulty arising on this account, as the Local Government could not give powers beyond its local limits.

A strictly literal interpretation of Section 14 would give the Local Government power to give jurisdiction to Magistrates in all cases committed throughout India in any local area outside the presidency towns, but the Courts would not recognize such jurisdiction beyond the local limits of the Local Government. They would read into Section 14 its necessary limitation, though unexpressed. Similarly it seems to me that they should read into the Notification its necessary, though unexpressed implications.

I have found no authority for applying a stricter rule to the construction of Notifications than is applied to the construction of Statutes.

My brother Maude has not dealt with the argument adopted by me that “all cases must necessarily include every case committed throughout the Punjab.”

He has dealt with the argument that inasmuch as no local area has been defined the jurisdiction conferred must be held to be as wide as it was competent to the Local Government to confer. This I admit is a more difficult position to maintain.

The objection to jurisdiction was not taken in the first Court, and it is not alleged that the accused has been prejudiced in any way by the defect in the Notification.

This cannot affect the abstract question whether the Magistrate had jurisdiction or not, but it may be considered in judging whether the construction put upon the Notification by me would lead to injustice.

It would not, I think, do so, for on the least suspicion that a faulty Notification of this kind had prejudiced the accused, the conviction could be set aside.

Chapter XLV of the Criminal Procedure Code deals with irregular proceedings, and Section 530 makes the proceedings void where an offender has been tried by a Magistrate not empowered by law on that behalf; but the spirit of construction, as shown in that chapter, is of a liberal kind: thus Section 537 (which postulates of course a Court of competent jurisdiction) which provides against any sentence being altered for any error, omission, irregularity in the complaint, summons, warrant, charge,

proclamation order, judgment or other proceedings before or during trial unless they have "in fact occasioned a failure of justice," and in determining whether there has been a failure of justice, the Court shall have regard to the fact whether the objection could, and should have been, raised at an earlier stage of the proceedings.

It must be understood that I am only referring to the chapter to assist me in the proper construction to put on the Notification, and to warrant me in construing it as I do.

I hold then that the Notification implies giving jurisdiction throughout the Punjab, and that Mr. Rennie had jurisdiction to try the case.

13th June 1901.

ROBERTSON, J.—The question referred to the Full Bench in this case is—had Mr. J. G. M. Rennie jurisdiction to try the petitioner on a charge of misappropriation under Section 409 of the Penal Code, the offence being alleged to have been committed in Kai ?

We are unanimous, I understand, in holding that whatever may be the history of Section 14 of the Criminal Procedure Code, and sections in previous Codes, more or less similar, under that section the Local Government has the power to appoint a Special Magistrate having jurisdiction throughout the entire local area, within which the Local Government has the power to appoint a Special Magistrate. The "local area" under Section 14 may be coterminous with the territories under the Punjab Government within which the Criminal Procedure Code is in force, or the local area may be restricted to something less than the entire province, *i. e.*, may consist of one or more divisions, districts or sub-divisions.

Starting with this premise we see that the jurisdiction must be confined to a local area of greater or less dimensions. No doubt it would have been far better and more convenient to have clearly specified that area in the Notification; and as it has not been specified, we should, I think, be precluded from holding that the necessary jurisdiction has been conferred on Mr. Rennie, unless we can hold that jurisdiction throughout the province was conferred upon him by "necessary implication." It was urged by the learned counsel for the petitioner that no doubt the Notification was intended to mean something, but that unfortunately as it stands it means nothing. While admitting that the language is not as felicitously chosen as it might have been, I do not think that this contention is tenable.

The Notification certainly confers on the Special Magistrate the power to try certain classes of cases. The Notification though it confers certain special powers on a particular individual, confers no new jurisdiction, and creates no new offices. All it does is to indicate which particular Magistrate shall try a certain set of cases, which under any circumstances could have been tried by one Magistrate or another. This distinguishes the case at once in a very material point from the case of *Queen-Empress v. Mangal Tek Chand* (1), where a special jurisdiction of a very unique and drastic nature was in question. There is no hint or suggestion that any of the persons tried by Mr. Rennie has suffered any prejudice, whereas if it be held that Mr. Rennie had no jurisdiction it is by no means unlikely that various accused persons will suffer serious prejudice. This, however, is by the way.

The Notification confers on Mr. Rennie jurisdiction to try *all* cases of a certain class on complaints by an officer whose charge is nearly coterminous with the Punjab though not exactly so, or by any Commissariat Officer. The Local Government had the authority to confer these powers throughout the territories under its control, or to limit the area within which those powers should be exercised to some smaller area. No limitation was imposed, and under these circumstances, I think the wording of the Notification, taken with all the circumstances of the case, must be taken necessarily to imply that Mr. Rennie had jurisdiction throughout the territories under the Punjab Government within which the Code of Criminal Procedure is in force to try the class of offences indicated. Certainly the mere omission of words of limitation in a Notification giving jurisdiction could not be held of itself to make it necessary to hold that the widest possible jurisdiction had been conferred in all cases. All that I hold is that there is such a necessary implication in the Notification before me, due regard being had to the scope and effect of the Notification on those concerned.

The actual wording of the Notification is as follows :—

“ under Section 14 of the Criminal Procedure Code, (Act V of 1898), the Hon'ble the Lieutenant-Governor is pleased to appoint and hereby does appoint Mr. J. G. M. Rennie, Divisional Judge, who has been posted temporarily to Rawalpindi, a Special Magistrate of 1st class for the term of three months with power to try all such cases as may be instituted in his Court on the complaint of the Commissary-General of the Punjab

(1) *I L. R.*, X Bom., 259.

“Command, or any other officer of the Commissariat Department, or, having been already instituted on such complaint in any other Court, may be transferred to his Court, and under Section 30 of the said Code, the Hon’ble the Lieutenant-Governor invests Mr. J. G. M. Rennie with power to try as such Magistrate all offences not punishable with death.”

There is in that Notification no limitation of the local area, and there are at least two places in the Notification in which we should have expected to find such a limitation had the jurisdiction been intended to be confined within any smaller area than that under His Honor the Lieutenant-Governor, and jurisdiction is given to try all cases of a certain class without limit as to the local area within which such offences may have occurred.

It must be remembered that this is merely the appointment of a Magistrate to do a special piece of work in lieu of other Magistrates who would otherwise have done it, and I think that there is a necessary implication in the Notification that Mr. Rennie’s jurisdiction extended over a local area coterminous with the area over which it was in the power of His Honor the Lieutenant-Governor to confer that jurisdiction. I am of opinion, therefore, that the question referred to us should be answered in the affirmative, Kai being within the territories subject to His Honor the Lieutenant-Governor within which the Criminal Procedure Code is in force.

12th June 1901.

CHATTERJI, J.—The question referred to the Full Bench is shortly expressed, but the full scope of it appears from the judgment which precedes it and the order of Mr. Justice Mande referring the case in which it arises to a Bench. From these I gather that our opinion is wanted on two points, (1) whether Mr. Rennie was a Special Magistrate appointed and invested with jurisdiction in accordance with law, and (2) whether he, as such Special Magistrate, had jurisdiction to try the accused and to record a valid judgment and order convicting and sentencing him.

From the argument before us it appeared that the contention on behalf of the accused was that Mr. Rennie’s appointment was invalid inasmuch as no local area was specified within which he was to have exercised his powers in the Notification or Notifications appointing him. The reply of the learned Legal Remembrancer was that the local area though not expressly mentioned in words, was sufficiently indicated in the Notifications by necessary implication. With reference to the second head of the question, as I have put it, the substance of the argument for the accused was that, even if it is found that some local area was specified for the

Special Magistrate, his order is void unless it is shown that Kai, where the offence charged is said to have been committed, was included within its limits.

Before I proceed to give my opinion, I would refer to the following observations of Lord Penzance pointing out the essential ingredients of the conception of jurisdiction: "That any given Court should have power to correct and punish a particular offence in a particular person, it is necessary that the offence itself should be of a nature to fall within its jurisdiction, that the person should be subject to its jurisdiction, and that the punishment awarded to him should be one which the Court is competent to inflict for that offence. These things constitute jurisdiction. *Combe v. Edwards* (1), at page 129-130." I also note that the objection as to jurisdiction was not urged before the first Court nor on appeal before the Sessions Judge. It was developed in its present form in the argument before Mr. Justice Maude. It is also not alleged, much less proved, that any prejudice has resulted to the accused in consequence of the trial having taken place at Rawalpindi instead of Kohat in which district Kai is situate.

Coming now to the matters for decision by the Full Bench, and taking up the first point for consideration, I am of opinion that it is essential that a Special Magistrate should be appointed for a "local area." The connotations of a Special Magistrate under the Code of Criminal Procedure are that he should have (1) specified powers conferable on a Magistrate by the Local Government, (2) a local area within which to exercise those powers, and (3) jurisdiction to try particular cases or a particular class or classes of cases or cases generally. Each of the above ingredients enters into the conception of a Special Magistrate as defined in Section 14 of the Code, but the last is a variable element and does not necessarily require specific mention. If nothing is said about the cases to be tried it will be understood that all cases triable by law by a Magistrate invested with the powers of the Special Magistrate may be tried by him. But the powers and the local area must be defined.

In the Notifications relating to Mr. Rennie's appointment his powers are stated as well as the class of cases he is to try, but there are no words specifying the "local area" within which he is to exercise his functions. The only words in them which have any reference to locality in that connection are those which recite that "he has been posted temporarily to Rawalpindi."

(1) *L. R.*, 3, *P. D.*, 103.

I am decidedly of opinion as laid down by the Bombay High Court in *Queen v. Mangal Tek Chand* ⁽¹⁾ that Penal Statutes must have a strict interpretation, by which is meant that no cases shall be deemed to fall within them which do not fall within the reasonable meaning of their terms and within their spirit and scope (Maxwell, 3rd Edition, 369). This view has the support of their Lordships of the Privy Council—see *Nga Hong v. The Queen* ⁽²⁾. We have here to interpret not a Statute but a Notification issued under a Penal Act, for the Criminal Procedure Code comes within that definition, but it creates a new criminal jurisdiction under statutory authority, and I apprehend the same rules of construction apply. Many of the leading authorities on the principles of judicial exposition of Statute law are collected in my brother Reid's learned judgment, and I need not therefore again quote them here. As we cannot supply a *casus omissus* in a Statute, we cannot import anything in the Notification which is not necessarily implied in the context, for we have to gather the intention of the Notification from its words and not from extraneous evidence. Subject to the consideration that it is issued under a Criminal Statute, and that therefore we must be reasonably strict in not importing considerations that are not fully supported by the language and the scope of the document. We may be permitted to add words necessary for giving effect to it as a Notification for the purpose it was issued. *In re Wainewright* ⁽³⁾ furnishes a good example of this mode of construction. But *Underhill v. Longridge* ⁽⁴⁾ is also most useful as exemplifying the caution to be observed in supplying omissions in Penal Statutes. It was a case under Section 19 of 18 and 19 Vic. C. 108, which provides that: "if loss of life to any person employed in a coal mine occurs "by reason of any accident within such coal mine, or if any serious "personal injury arises from explosion therein, the owner of such "mine shall within twenty-four hours next after such loss of life, "send notice of such accident, &c.," or be liable to a penalty. An accident having occurred which caused serious personal injury and the owner not having made any report, the Court refused to impose the penalty by importing the clause about serious personal injury after the words "such loss of life." Here there was no doubt about the intention to impose the duty of giving notice in the event of serious personal injury, but there was a slip in the drafting and the Court refused to levy the penalty by supplying the omission.

⁽¹⁾ *I. L. R.*, X Bom., 263 at p. 270.

⁽²⁾ 7, Moo's *I. A.*, 72.

⁽³⁾ 1, *Phil.*, 261.

⁽⁴⁾ 29, *L. J. M. C.*, 65.

Taking the principles above recited for a guide, and bearing in mind also a cardinal rule of construction that the whole of a document must be read together and should have effect, if possible, as well as every word contained in it, I am of opinion, after careful consideration of the question, that it will not be right to read into the Notification that the local area was intended to be co-extensive with the whole province. I am unable to say that this must be inferred by necessary implication. The simple argument that otherwise the Notification will be infructuous is not a sufficient justification for such a construction. There is no knowing to what lengths we might be required to go if we admit its force. Our duty is to interpret the Notification and not to make up a fresh one. I might have been inclined to draw such an inference if there was anything in the Notification which legitimately gave rise to it. For example, had there been a specification of the cases which he had to try with details about the localities in which they arose, and even without the mention of the localities, we might have been able to conclude that as the Special Magistrate was authorized to try so many cases in so many different districts, these districts were necessarily included in the local area in which he was to exercise his functions, and in this way the whole province might have been included. But here the class of cases specified are quite insufficient to raise any such presumption. The cases themselves were yet an unknown quantity and there was no reason to infer *à priori* that they arose in more than one district. The interpretation cannot be controlled by facts that subsequently transpired, and we have to find what meaning could be ascribed to the Notification at the time it was issued. The argument as to the Punjab Command is, I think, effectively disposed of by my brother Maude, and I need not repeat his reasons here. Then there is the clause about complaints by any other officer of the Commissariat Department which might include Commissariat Officers of other Commands. I confess I have great difficulty first in extending the scope of the Notification as regards "local area" over the whole of India, or if need be, beyond India, with reference to its language and then in restricting the area within the Punjab, because it was not within the competency of the Local Government to confer jurisdiction beyond it. Such an interpretation would, I think, be unsupported by precedent, and if we allow it, we might next be told to supply blanks or to make particular inferences as to the powers of the Magistrate where none have been specified, on the mere ground that the intention of the Government would thereby be carried into effect. I hold therefore that such a construction is not admissible.

I am, however, not prepared to find that no local area has been specified in the Notification.

My view is that there are words in the Notification which refer to locality for the exercise of the Special Magistrate's powers, and that they must receive their full effect. They undoubtedly mean or imply that he is to hold his Court at a particular place, *viz.*, Rawalpindi, and this itself ordinarily implies that he has jurisdiction there, for the exercise of his functions outside his jurisdiction would be a very abnormal state of things which cannot be postulated. In addition to this the words, "posted to a particular place," applied to a Magistrate mean in ordinary parlance appointed to the district of which the place is the head-quarters, and it is permissible, and in fact proper, to take the words in their popular sense. These words could have been shown to be used with a different meaning, but have not, and there is nothing in the rest of the Notification to indicate anything to the contrary. In fact the interpretation accords so far as it goes with the intention of Government contended for by the Legal Remembrancer. The accused may indeed object to the scope of the words being extended, but he cannot by any rational construction disprove the Special Magistrate's jurisdiction over the Rawalpindi civil station, the cantonment being specially provided for and not mentioned, as there is no limitation to the power of Government as to local area under Section 14, Criminal Procedure Code. But it is a more rational interpretation that the Special Magistrate had jurisdiction over the district, and this would be in consonance with the scheme of the Code in general, and with Section 12 in particular. I am of opinion, therefore, that we should be justified from the popular sense of the words used as to locality, that Mr. Rennie, by virtue of the Notification, had local jurisdiction in the district of Rawalpindi, and I hold accordingly. This is my reply to the first of the two heads into which I have divided the question before the Full Bench.

With reference to the second head my view is briefly as follows:—In answering the question we ought to take note of the circumstances under which the question has been raised. My finding on the first point makes it clear, as far as I am concerned, that Kai, where the offence is said to have been committed, is outside the local limits of Mr. Rennie's jurisdiction, but the word "jurisdiction" without qualification is used in the question, and I am disposed to think that the objection that Kai was outside those limits does not raise a point of jurisdiction properly so called. I have quoted Lord Penzance's definition or exposition of the ideas which are involved in the conception of jurisdiction. Want of jurisdic-

tion in a Court necessarily avoids all proceedings taken by it. But defect of local jurisdiction under the Code of Criminal Procedure does not always involve this consequence. The objection to the Special Magistrate's jurisdiction, as found by me, must be based on Section 177 of the Code, but it does not lay down an absolutely inflexible rule, but says that the rule laid down in it shall be *ordinarily* acted on.

"Sections 177 to 185 deal with venue and Section 531 shows "that venue is not a matter of jurisdiction when the question is "whether a trial or inquiry ought to have been held in some other "local area in British India than that in which it was held." *Shahmir Khan v. The Empress* ⁽¹⁾ to which I would refer for a critical exposition of the relative bearings of the various sections of Chapter XV and of those of Chapter XLV which is most instructive.

There are many authorities which lay down that, in the absence of prejudice, Section 531 cures the irregularity of the trial or inquiry taking place in the wrong Sessions Division or District, &c. *Mohesdas v. Empress* ⁽²⁾; *In re Bichitranund Dass v. Bhugbut Perai* ⁽³⁾ at page 676; *In re Atmaram Gobind* ⁽⁴⁾.

Venue is quite distinct from jurisdiction. Encyclopædia of the Laws of England. Title *Venue* quoting *Compania de Mozambique v. British South Africa Co.* ⁽⁵⁾.

In short my opinion is that the trial of a case under the Code of Criminal Procedure in a wrong district in contravention of the provisions of Section 177 is not necessarily a fatal defect, and that local jurisdiction is not synonymous with essential jurisdiction. I do not desire to enlarge upon this part of the case as it was not discussed in the argument, but I have given my view in brief, because it must form part of my answer to the question before the Full Bench.

My reply in short, then, is that Mr. Rennie's appointment is not invalid on the ground that there is no local area mentioned in the Notification and that Kai was beyond his local jurisdiction, but that this does not involve our holding that his proceedings are void for want of jurisdiction in the true sense of the word.

REID, J.—The facts are stated in the orders of reference to the Division and Full Benches, and need not be repeated. Counsel for the petitioner contended (1) that Section 14 of the Code of

14th June 1901.

(1) 35, P. R., 1888, Cr.

(2) I. L. R., XVI Cal., 667.

(2) 44, P. R., 1885, Cr.

(4) 2, Bom., L. R., 394.

(5) App. Cases, 1893, p. 602.

Criminal Procedure did not empower the Local Government to confer on a Magistrate jurisdiction over an area more extensive than a district, and (2) that, inasmuch as no local area was specified in the Notification relied on by counsel for the Crown as conferring jurisdiction, the Magistrate appointed by that Notification had no local jurisdiction.

The first contention presents little difficulty.

A comparison of Sections 12, 14, 40, 182 and 531 of the Code, in which the term "local area" appears, does not advance the contention, indeed the last section favours the view that "local area" may comprise a Sessions Division, which, in some cases, includes several districts, and in *Punardeo Narain Singh v. Ram Sarup Roy* (1), *Bauerjee, J.*, expressed the opinion that the term might include a province, with reference to Section 182 of the Code. Counsel for the petitioner further cited the *dictum* in *Rice v. Slee* (2) that the term place is not confined to one parish, but means any aggregation of houses and inhabitants which has received a separate name, but this does not help him. It obviously means that a parish and a smaller area might equally be a place, it does not mean that a larger area might not.

In *Courtauld v. Legh* (3), *Cleasby, B.*, remarked that it is a sound rule of construction to give the same meaning to the same words occurring in different parts of an Act of Parliament, and I am satisfied that the term "local area" is not used in a more restricted sense in Section 14 than in Sections 182 and 531 of the Code.

This being the case, I see no reason for holding that the term may not include the whole of the territory subject to a Local Government. The second contention presents considerable difficulty.

Mr. Rennie was posted temporarily to "Rawalpindi." He was not appointed under Section 12 of the Code a Magistrate in the Rawalpindi District, and I understand the "posting" to mean that he was directed to hold his Court at the place called Rawalpindi, as opposed to the district of that name. The mere posting conferred on him no powers and did not define his local jurisdiction. In *re the petition of Sheikh Fakradin* (4), *West, J.*, said: "Turning to Section 12 of the Code we find the local jurisdiction of the subordinate Magistrates, including the 1st class Magistrates, is viewed as of a less extensive character than that

(1) *I. L. R.*, XXV Cal., 858.

(2) *L. R.*, 7, C. P., 381.

(3) *L. R.*, 4, Ex., 130.

(4) *I. L. R.*, IX Bom., 40.

“of the District Magistrate, whose local jurisdiction again does
“not extend beyond the area called a ‘district’; and unless there
“is any express enactment to the contrary it appears sufficiently
“clear that the legislature did not contemplate an exercise of
“jurisdiction by any Magistrate outside the limits of an area
“called a district in which he might be appointed by the Local
“Government. Referring next to the chapter treating of
“jurisdiction of Criminal Courts in general, we find a fundamental
“principle laid down in Section 177, to the effect that the compe-
“tency of a forum to take cognisance of an inquiry into and
“trial of an offence as defined by Section 4 of the Code is
“determined by the place in which the offence may have been
“committed.” A Magistrate has no inherent right to entertain
a complaint. He can only exercise this power within a certain
local area, which is defined by the Local Government, and his
jurisdiction is limited to complaints of offences committed within
such local area.

Had the Rawalpindi District or any sub-division of that
district been specified as the local area within which Mr. Rennie
was empowered to exercise jurisdiction, it would be necessary to
consider the applicability of Section 531, but, in the absence of
any specification, the question does not arise.

Counsel for the Crown admits that Mr. Rennie was either
empowered to entertain complaints of offences committed in any
part of the territory subject to the Punjab Government, or was not
empowered at all.

The Kohat Court would ordinarily have jurisdiction to
entertain the complaint out of which this reference has arisen,
and the question for consideration is whether that jurisdiction has
been ousted by the appointment of Mr. Rennie. Under Section
14 the local area within which the powers conferred may be
exercised should obviously be specified by the Local Government,
and it has not been specified.

Can the omission be supplied by necessary implication, and
is the implication, that the Local Government intended the juris-
diction to extend to the whole territory subject to it, and did so
extend it, necessary?

The right which an accused person, who is presumed to be
innocent until he is proved to be guilty, enjoys, of having a
complaint inquired into in the district in which the offence is
alleged to have been committed, cannot be taken away lightly or
without clear authority.

In *Rez v. Banbury* ⁽¹⁾, Parke, J., said: "The rule of construction which the Court must follow is to intend the Legislature to have meant what they have actually expressed, unless a manifest incongruity would result from doing so or unless the context clearly shows that such a construction would not be right."

In *Perry v. Skinner* ⁽²⁾, Parke, B., said: "The rule by which we are to be guided in construing Acts of Parliament is to look at the precise words and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice; and, if it should, so to vary and modify them as to avoid that which it certainly could not have been the intention of the legislature should be done." In *Jones v. Smart* ⁽³⁾, Buller, J., said: "A *casus omisus* can in no case be supplied by a Court of law, for that would be to make laws." In *ex parte The Vicar of St. Sepulchre* ⁽⁴⁾, Lord Westbury, L. C., said: "Where the conclusion is merely that there is a *casus omisus* for which the legislature has not provided, to alter the ordinary rules of interpretation, upon the principle of a duty due to abstract justice is simply to legislate, and not to interpret." *Ib.* James, L. J., in *re Sneezum* ⁽⁵⁾.

In *Mersey Docks and Harbour Board v. Henderson Brothers* ⁽⁶⁾, Lord Fitzgerald said: "We ought not to create a *casus omisus* by interpretation save in some case of strong necessity" and Lord Halsbury, L. C., said: "No case can be found to authorise any Court to alter a word so as to produce a *casus omisus*."

In *Abley v. Dale* ⁽⁷⁾, Jervis, L. J., said: "If the precise words used are plain and unambiguous, in our judgment, we are bound to construe them in their ordinary sense, even though it do lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning."

In *Charlton v. Lings* ⁽⁸⁾, Willes, J., said: "It is quite clear that whatever the language used necessarily and naturally implies is expressed thereby."

In *Underhill v. Longridge* ⁽⁹⁾, Cockburn, C. J., refused to import into 18 and 19 Vict., Cap. 108, Section 9, words imposing

(1) 1, A. and E., 136.

(2) 2, M. and W., 471

(3) 1, T. R., 44.

(4) 33, L. J. Ch., 372.

(5) L. R., 3, Ch., Dn., 472.

(6) 13, App. Cases, 595.

(7) 11, C. B., 378.

(8) L. R., 4, C. P., 374.

(9) 29, L. J. M. C., 65.

a duty on coal mine-owners and agents to send notice to the Inspector within 24 hours of an accident causing serious personal injury, although such words appeared from the context to have been omitted accidentally, holding that they could be supplied only by the legislature. Where the alternative lies between either supplying by implication words which appear to have been accidentally omitted, or adopting a construction which deprives existing words of all meaning, it is usual to supply the words. *Jubb v. Hull Dork Co.* (1), *re Wainwright* (2).

In *Flower v. Lloyd* (3) and *Diss v. Aldrich* (4), it was held that enactments which create new jurisdiction or delegate subordinate legislative or other powers must be strictly construed.

In *Nga Hoong v. The Queen* (5), their Lordships of the Privy Council said, at page 98: "Now there is nothing more clear than that with respect to the Criminal law, the construction is always 'to be strict,'" and at page 103, "If the Mofussil Court has no 'jurisdiction now to dispose of this case, they (the prisoners) must escape justice; but we are not, in any way, to alter 'or construe differently the rules of the Criminal law in consequence of the supposed justice of a particular case. The rule 'is that such law is to be construed strictly.'" In *Crawford v. Spooner* (6), it was said: "we cannot aid the Legislature's defective phrasing of an Act, we cannot add and mend and, by construction, make up deficiencies which are left there."

Now the words which appear to have been accidentally omitted from the Notification empowering Mr. Rennie are words defining the local area within which he was to exercise jurisdiction. But what were the precise words? Were they words extending to the whole territory subject to the Local Government or to some more limited area?

Counsel for the Crown contended that the words in the Notification "to try all such cases as may be instituted in his Court on the complaint of the Commissary-General of the Punjab Command" imply that the jurisdiction conferred is over the territory subject to the Local Government, but, as pointed out by my brother Maude, whose judgment I have had the advantage of reading, the Punjab Command and the territory subject to the Local Government are not coterminous. Are we then to limit the jurisdiction conferred to so much of the Punjab as is within the "Punjab Command" or extend it to the territory subject to the Local Government?

(1) *L. R.* 9, *Q. B.*, 455.

(2) 1, *Phil.*, 261.

(3) *L. R.* 6, *Ch. Dn.*, 301.

(4) *L. R.*, 2 *Q. B. Dn.*, 179.

(5) 7, *Moo.'s I. A.*, 72.

(6) 6, *Moo.'s P. C.*, 9.

I understand the rule laid down by the authorities above cited to be that words supplying an omission may be implied where there can be no reasonable doubt what those words are, and the omission deprives existing words of all meaning, but that a *casus omissus* cannot be created or produced, and that words not necessarily implied are not to be introduced merely because the omission creates an absurdity or manifest injustice. The duty of the Courts is not to confer jurisdiction but to decide whether jurisdiction has been conferred. I have not referred to *Queen-Empress v. Mangal Trik Chand* ⁽¹⁾, as it does not appear to me to take the case further than the authorities above cited.

The question for decision resolves itself into this, do the words "to try all such cases" *et seq* above quoted, necessarily imply any definite local area within the terms of Section 14 of the Code, or is the word "all" limited to the class of cases and intended merely to include offences punishable under local and special Acts as well as those punishable under the Penal Code?

Even if the word be limited in the latter sense a wide field of speculation is opened up. Could a Commissariat Officer insist on a person, charged with maiming or stealing a transport animal at Delhi or Umballa, being tried by Mr. Rennie at Rawalpindi? Officials must of course be credited with the ability to exercise discretion in such matters, but the power conferred might very possibly be abused. The absence of direct authority on the subject of Notifications is probably due to the fact that a Notification of this description, entirely omitting specification or definition of the local area has not previously been published, but applying the authorities above cited, I am unable to hold that the Notification conferred any territorial jurisdiction. Some local area should obviously have been specified and there is, in my opinion, clearly a *casus omissus*. The omission can, in my opinion, be supplied only by Notification and cannot be supplied by this Court. It does not deprive the Notification of meaning. It merely deprives it of effect.

For these reasons my answer to the reference is in the negative.

(1) *I. L. R., X Bom., 258, 263 274.*

No. 25.

Before Mr. Justice Clark, Chief Judge, and Mr. Justice Maude.

SHER MUHAMMAD,—APPELLANT,

Versus

THE EMPEROR OF INDIA,—RESPONDENT.

} APPELLATE SIDE.

Criminal Appeal No. 421 of 1901.

Conviction at one trial for two offences—Four years' rigorous imprisonment for each offence, but the sentences ordered to run concurrently—Appeal—Jurisdiction—Appeal from such sentence—Criminal Procedure Code, 1898, Sections 35, 408.

Held, that where the two sentences had to run concurrently there can be no aggregation of sentences, and as there was no sentence of imprisonment for a term exceeding four years the appeal lay to the Sessions Court.

Appeal from the order of Lieutenant A. J. O'Brien, Additional District Magistrate, Dera Ismail Khan, dated 30th May 1901.

Madan Gopal, for appellant.

Government Advocate, for respondent.

The judgment of the Court was delivered by

MAUDE, J.—In this case the appellant was convicted by the Additional District Magistrate at one trial of committing two offences under Section 331 of the Indian Penal Code, and for each offence was sentenced to four years' rigorous imprisonment, the sentences to run concurrently. An appeal was preferred to Sessions Court, but the learned Sessions Judge held that under Section 35 of the Code of Criminal Procedure there was for the purpose of appeal an aggregate sentence of 'eight years' imprisonment, and therefore under Section 408, proviso (b), the appeal lay to the High Court. The appeal was then filed in this Court. 10th July 1901.

We are of opinion that the view taken by the learned Sessions Judge is erroneous. The very fact that the two sentences run *concurrently* precludes the existence of *aggregate* sentences. Section 408 of the Code enacts that the appeal from a sentence passed by a Magistrate specially empowered under Section 30, lies to the High Court only if the sentence is one of imprisonment for a term exceeding four years, and in the present case as there is no aggregation of the sentences there is no sentence of imprisonment for a term exceeding four years, and therefore the appeal lies to the Sessions Court. The appeal is accordingly returned to the Sessions Judge for disposal.

No. 26.

Before Mr. Justice Reid.

MOKAND LAL,—APPELLANT,

APPELLATE SIDE.

Versus

THE EMPEROR OF INDIA,—RESPONDENT.

Criminal Appeal No. 422 of 1901.

Penal Code, Sections 466, 471—Forgery—Using as genuine a forged document—Punishment both for forging a document and for using it as genuine.

Held, that the conviction, under Section 471 of the Penal Code, of a person, convicted in respect of the same document under Sections 466 cannot stand. It is immaterial that the latter conviction is under Section 109 and Section 466, not under Section 466 alone, and an abettor of forgery cannot be punished under both sections any more than the forger can be so punished. He may be punished as if he were the forger. *Queen-Empress v. Umrao Singh* (1) cited.

Appeal from the order of Captain M. W. Douglas, District Magistrate, Delhi, dated 14th May 1901.

Harris, for appellant.

Government Advocate, for respondent.

The judgment of the learned Judge was as follows :—

3rd Augt. 1901.

REID, J.—The facts established by evidence, which I see no reason to doubt, are that the appellant in 1896 instituted a suit for the recovery of about Rs. 500, against one Shugand Chand, in which Lakku Mal was not a witness; that in 1898 the appellant instituted a suit against Lakku Mal for the recovery of more than Rs. 800, and filed a copy of what purported to be the evidence of Lakku Mal, witness for the defendant, in the 1896 suit, and that the page of the record, on which what purports to be the deposition of Lakku Mal is recorded, is a forgery, and has been substituted for the original page, which did not contain a deposition by Lakku Mal.

The substituted page represents Lakku Mal as having deposed, in cross-examination, that he had money dealings with the plaintiff (the appellant), that he owed the plaintiff money, and that he had an account kept in a single *bahi*. The object of the forgery is obvious.

On these facts I have no hesitation in holding that the appellant fraudulently used as genuine a document, purporting to

(1) *I. L. R.*, XXIII All., 81.

be a record of a Court of Justice, which he knew to be a forged document, and thereby committed an offence punishable with rigorous imprisonment for seven years and fine under Section 471 of the Penal Code. The appellant knew that Lakku Mal was not a witness in the previous suit.

He has, however, been sentenced under Section 466 and Section 109 of the Code to transportation for seven years, in addition to transportation for an equal term imposed under Section 471.

Although the approver, Abdul Ghafur, made certain statements, which I cannot accept as true, his evidence may, in my opinion be accepted in so far as it is corroborated and it is, in my opinion, amply corroborated in respect of the fact that the forgery was committed with the knowledge and consent, and at the request of the appellant. The conviction under Section 466 and Section 109 is therefore justified, if standing by itself, but that conviction and the conviction under Section 471 cannot both stand.

In a recent ruling of the Allahabad Court, *Queen-Empress v. Umrao Lal* ⁽¹⁾, Aikman, J., remarked "Section 471 provides "that whoever fraudulently or dishonestly uses any document as "genuine, knowing or having reason to believe it to be forged, "shall be punished in the same manner as if he had forged such "document. The concluding words of this section lead me to "believe that it is directed against some person other than "a person proved to be the actual forger. The section "is useful as an alternative charge when it is not certain "whether the accused person is himself the forger of a document "or has merely used it as genuine. But I cannot recall a case in "which a forger has been punished both for forging a document "and for using it as genuine. For the reasons set forth "above I am of opinion that the conviction under Section 471 "should not stand."

I concur in this exposition of the law, which applies to the present case. A conviction, under Section 471, of a person convicted in respect of the same document under Section 466 and Section 109 cannot stand. It is immaterial that the latter conviction is under Section 466 and Section 109, not under Section 466 alone, and an abettor of forgery cannot be punished under both sections any more than the forger can be so punished. He may be punished as if he were the forger.

(1) *I. L. R.*, XXIII *Al.*, 84.

I set aside the conviction and sentence under Section 471 of the Penal Code.

The offence committed is very serious, and the object was to fraudulently obtain a considerable sum of money from Lakku Mal, but this appears to be the first offence committed by the appellant, and the maximum sentence provided by the section is, in my opinion, uncalled for, while fine appears appropriate as part of the sentence.

I reduce the sentence passed under Section 466 and Section 109 to rigorous imprisonment for five years, including solitary confinement for three months, and a fine of Rs. 200, or, in default, to rigorous imprisonment for a further term of one year. To this extent the appeal is allowed.

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No. 27.

Before Mr. Justice Reid.

SALAR BAKHSH,—APPELLANT,

Versus

THE EMPEROR,—RESPONDENT.

Criminal Appeal No. 387 of 1901.

APPELLATE SIDE. {

Transportation instead of imprisonment, in what cases awardable—Penal Code, Section 59.

The District Magistrate, having convicted the prisoner for offences under Sections 376 and 366 of the Penal Code, sentenced him to rigorous imprisonment for seven and three years and converted the two sentences into one of transportation for ten years under Section 59 of the Penal Code.

Held, that the general sentence of transportation was illegal. To bring Section 59 of the Penal Code into operation the punishment awarded in each offence alone must be not less than seven years' imprisonment.

Queen v. Shonnullah ⁽¹⁾, *Queen v. Gour Chunder Roy* ⁽²⁾, and *The Crown v. Sunda* ⁽³⁾ cited.

Appeal from the order of Captain M. W. Douglas, District Magistrate, Delhi, dated 3rd May 1901.

The judgment of the learned Judge was as follows :—

3rd Augt. 1901.

REID, J.—The record contains ample evidence that the appellant abducted a girl aged about nine years, in order that she might be forced to illicit intercourse, and that he committed on her person the offence of rape. He was arrested while attempting to leave Delhi with the girl, whom he had disguised

⁽¹⁾ 5, W. R., 44, Cr. ⁽²⁾ 8, W. R., 2, Cr.
⁽³⁾ 63, P. R., 1866, Cr.

as a boy; a medical practitioner who examined the girl, deposed that the offence of rape had been committed on her; and the Chemical Examiner detected semen and mammalian blood on the girl's pyjamas which the appellant was carrying in a bundle when arrested. The Magistrate has not recorded reasons for charging the appellant under Section 363 of the Penal Code instead of Section 366, which is obviously the appropriate section where a girl, not at the time in charge of any one, but in the street with girls of her own age, has been abducted with the intention and object found to have existed in this case. Section 363 has not even the advantage of enabling the Court to pass a sentence more severe than could be passed under Section 366.

I maintain the conviction under Section 376 of the Code, and I set aside the conviction under Section 363, and convict the appellant of an offence punishable under Section 366 of the Code. I also maintain the sentences of rigorous imprisonment for seven years and three years, which are by no means excessive, having regard to the brutality and serious nature of the offences committed, but the order under Section 59 of the Code, converting those sentences into one sentence of transportation for ten years cannot stand. *Queen v. Sh. Naullah* ⁽¹⁾ and *Queen v. Gour Chunder Roy* ⁽²⁾ are authority for this interpretation of the law laid down in Section 59, which was also adopted in *The Crown v. Sunda* ⁽³⁾. Section 59 applies only to a sentence of imprisonment for seven years or upwards, and does not apply to a cumulative sentence in lieu of two sentences of which one is for a term less than seven years.

I set aside the order under Section 59 of the Penal Code.

Except as above specified the appeal is dismissed.

No. 28.

Before Mr. Justice Reid.

WASAYA,—PETITIONER,

Versus

THE EMPEROR,—RESPONDENT.

Criminal Revision No. 734 of 1901.

Security for good behaviour—Amount of security—Consideration in fixing—Criminal Procedure Code, 1898, Section 118.

The petitioner was committed to jail in default of furnishing his bond in Rs. 500, with two sureties who should be respectable landowners, to be of good behaviour for three years.

⁽¹⁾ 5, W. R., 44, Cr. ⁽²⁾ 8, W. R., 2, Cr.
⁽³⁾ 63, P. R., 1866, Cr.

Held, that in fixing the amount of security the station of life of the person concerned should be considered, and a fair chance of complying with the required conditions afforded, and that such a condition as that the sureties should be respectable landowners is obviously opposed to justice. The object of Chapter VIII of the Code of Criminal Procedure is not to fill the jails with persons against whom convictions of offences punishable under the Penal Code cannot be obtained but to ensure good conduct out of jail.

Queen-Empress v. Roza Ali ⁽¹⁾, *Queen-Empress v. Rama* ⁽²⁾ and *The Empress v. Dedar Sircar* ⁽³⁾ cited.*

Petition for revision of the order of Cuptain H. S. Fox-Strangways, District Magistrate, Muzaffargarh District, dated 22nd April 1901.

The judgment of the learned Judge was as follows:—

3rd Augt. 1901.

REID, J.—The petitioner was committed to jail in default of furnishing his bond in Rs. 500, with “two sureties who shall “be respectable landowners, to be of good behaviour for three “years.”

The object of Chapter VIII of the Code of Criminal Procedure is not to fill the jails with persons against whom convictions of offences punishable under the Penal Code cannot be obtained, but to ensure good conduct out of jail.

In *Queen-Empress v. Raza Ali* ⁽¹⁾, *Queen-Empress v. Rama* ⁽²⁾, and *The Empress v. Dedar Sircar* ⁽³⁾, the following remarks, which appear at page xlvii of the Appendix to *IV Mad, II. C. R.*, are approved. “The power given by the section is one that “should be exercised discreetly, and in fixing the amount of “security the Magistrate should consider the station of life of the “person concerned and should not go beyond a sum for which there “is a fair probability of his being able to find security. The imprisonment, it must be remembered, is provided as a protection to “society against the perpetration of crime by the individual, and “not as a punishment for a crime committed, and, being made conditional on default of finding security, it is only reasonable and “just that the individual should be afforded a fair chance at least “of complying with the required condition of security.”

The condition that the sureties shall be respectable landowners is obviously opposed to the spirit of the passage quoted above. It is quite possible that a respectable member of society may be unable to induce two landowners, on whose respectability

(1) *I. L. R.*, XXIII All., 80. * See also 17, *P. R.*, 1900, Cr. Ed., *P. R.*
 (2) *I. L. R.*, XVI Bom., 372. 24, *P. R.*, 1900, Cr.
 (3) *I. L. R.*, II Calc., 384. 30, *P. R.*, 1800, Cr.

the Magistrate reserves to himself the power to decide, to stand security for him, and the result would be confinement in jail. Men harassed under the provisions of Chapter VIII of the Code are in many instances driven to crime.

The sum fixed appears to be excessive.

I amend the order by substituting Rs. 200 for Rs. 500 and by eliminating the words "who shall be respectable landowners."

No. 29.

Before Mr. Justice Reid.

HASSAN *alias* KAHN,—PETITIONER,

Versus

THE EMPEROR,—RESPONDENT.

Criminal Revision No. 733 of 1901.

} REVISION SIDE.

Confession—Confession of co-accused—Joint trial—Evidence Act, 1872, Section 30.

Held, that a prisoner who had escaped from custody during trial, but before charge, and has been tried separately after re-arrest, cannot be said to have been tried jointly with one whose trial, from a stage prior to the charge, was separate, by reason of the escape from custody, and that the confession of the co-accused, who was first tried, was inadmissible against the prisoner, the trial not having been joint.

Petition for revision of the order of Maulvi Inam Ali, Sessions Judge, Sialkot Division, dated 27th May 1901.

The judgment of the learned Judge was as follows :—

REID, J.—Salihon, whose confession has been admitted in 3rd August 1901. evidence against the petitioner and has been relied on by the lower Appellate Court, was not tried jointly with the petitioner. Both were sent up for trial together and appear to have been in the dock together, but, before charges were framed, the petitioner escaped from custody, and was not re-arrested until long after the trial of Salihon had terminated.

The prisoners had not been called on to plead when the petitioner escaped. It has been held that a prisoner, who pleads guilty and is thereupon convicted and sentenced, cannot be said to be tried jointly with prisoners who plead not guilty, though all were committed on one charge; and, whatever doubt may exist as to the correctness of that decision, there can, in my opinion, be no doubt that a prisoner who has escaped from custody during trial and before charge and has been tried separately, after re-arrest, cannot be said to have been tried jointly with one whose trial, from a stage prior to the charge, was separate, by reason of the escape from custody of the co-accused.

Salihon was charged on the 19th July 1898, and the petitioner was charged on the 27th April 1901. The fact that the witnesses who had been examined for the prosecution before the petitioner's escape were not re-examined in chief does not, in my opinion, affect the question

The trial not having been joint, the confession of Salihon is inadmissible against the petitioner. I set aside the order of the lower Appellate Court, and I order that the appeal be re-tried excluding the confession of Salihon from consideration.

Application allowed.

No. 30.

Before Mr. Justice Reid.

SOBHA SINGH,—PETITIONER,

Versus

LAL CHAND,—RESPONDENT.

Criminal Revision No. 643 of 1901.

REVISION SIDE. }

Criminal Procedure Code, 1898, Section 195, clause 7 (a)—Sanction to prosecute—Subordination of Courts—Power of District Magistrate to revoke sanction granted by Magistrate of the 1st class—Contradictory statements made before two different Courts not subordinate to each other—Power to give sanction—Penal Code, Section 193.

Held, that for the purposes of Section 195, Criminal Procedure Code a Magistrate of the 1st class is subordinate to the District Magistrate, who has jurisdiction to revoke a sanction granted by a 1st class Magistrate.

Held also, that where the accused made contradictory statements in the Courts of a 1st class Magistrate and of an Honorary Magistrate, the sanction granted by the former was unauthorised as the Court of the latter was not subordinate to his Court.

Simble.—The Court competent to grant sanction under such circumstances is the Court to which both the Courts in which the contradictory statements were made are subordinate.

Waryam v. Amir and others (1) explained, and *Phina Singh v. The Empress* (2) followed.

Petition for revision of the order of E. A. Estcourt, Esquire, District Magistrate, Rawalpindi, dated 9th March 1901.

Sukh Dial, for petitioner.

Ishwar Das, for respondent.

The judgment of the learned Judge was as follows :—

15th Augt. 1901.

REID, J.—I see no reason for interference.

Waryam v. Amir and others (1) cited for the petitioner is not applicable to the new Code of Criminal Procedure.

(1) 10, P. R., 1894, Cr.

(2) 25, P. R., 1889, Cr.

Act V of 1898, Section 195 (7) (a) of which provides that, where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate. The amendment has terminated the conflict which previously existed as to the meaning of the words in Section 195 "the Court to which appeals from the former Court "ordinarily lie."

Under Section 406 of the Code appeals from orders under Section 118, passed by Magistrates of the 1st class, lie to the District Magistrate, and a Magistrate of the 1st class is therefore, for the purposes of Section 195, subordinate to the District Magistrate, who has jurisdiction to revoke sanctions granted under that section by Magistrates of the 1st class.

The next plea taken is that sanction should not have been revoked.

Under *Phina Singh v. The Empress* (1), the District Magistrate had no alternative to revoking sanction, although his revocation is not based on the rule laid down in that authority, and it is extremely difficult to gather from his order the meaning he intended to convey. Lal Chand, respondent, made contradictory statements in the Courts of the Magistrate who granted sanction and of the Honorary Magistrate of Rawalpindi city, not subordinate to the former Magistrate. The sanction runs: "It is therefore ordered "that Sobha Singh be granted permission to prosecute Lal Chand "under Section 193 of the Penal Code, for having made inconsistent statements." The body of the order granting sanction sets out the application for sanction, which sets out the statements made by Lal Chand, and the dates on, and the Courts in, which such statements were made, and the charge is not "in very vague "words," or one which "cannot be properly met by the complainant" as the District Magistrate holds; but, in the words of Plowden, S. J., in the authority cited above, the Magistrate of the 1st class "was not competent to sanction prosecution for and "offence of which (if committed) he could not predicate that it had "been committed before himself, but could only predicate that it "had been committed either before himself or before another "Magistrate."

I dismiss the application.

The remedy of the petitioner, as pointed out by Plowden, S. J., is to move the Court to which both the Courts, in which the contradictory statements were made, are subordinate.

Application dismissed.

(1) 25, P. R., 1889, Cr.

No. 31.

Before Mr. Justice Robertson.

MANGAL SINGH,—PETITIONER,

REVISION SIDE. {

Versus

THE EMPEROR OF INDIA,—RESPONDENT.

Criminal Revision No. 351 of 1901.

House-trespass by night—Intention—Charge—False statement in charge in order to hide the real offence—Penal Code, Sections 457, 498.

Where a charge is made of an offence under Section 457 with intent to commit theft, and the Court finds that such statement was made to hide the real offence which was one under Section 498, it should be very chary of convicting, especially if the prosecution had not alleged an offence of that nature and the accused has had no fair chance of meeting such a charge.

Sarwan v. The Empress ⁽¹⁾, cited.*Petition for revision of the order of W. Chevis, Esquire, Sessions Judge, Ferozepore Division, dated 11th March 1901.*

Krishen Singh, for petitioner.

The judgment of the learned Judge was as follows:—

6th June 1901.

ROBERTSON, J.—This case appears to me to be a very doubtful one indeed, and I think that Courts should proceed very carefully in such cases where the complainants do not choose to put the true facts forward. If the charge really is that an accused committed an offence under Section 457 with a view to commit an offence under Section 497, it is only fair to him that the offence with which he is charged should be fairly stated in order that he may meet it. But when a charge is made of an offence under Section 457 with a view to commit theft, and the Court finds that there was no intention to commit theft, the Courts should be chary of convicting and punishing for an offence under Section 457, with a view to commit an offence under Section 497 when the prosecution has not alleged such an offence and the accused has had no real chance of meeting such a charge. It is not altogether fair to an accused who succeeds in meeting a charge under Section 457 with a view to commit theft to find when he has met that charge that he is confronted with a conviction on a totally different charge which he might have met, and to which he might be able to make a totally different and good defence. There are defences to a charge of committing an offence under Section 457 with a view to commit adultery which could not be set up if the

⁽¹⁾ 41, P. R. 1882, Cr.

offence intended to be committed is theft, and an accused may be materially prejudiced by not knowing the true nature of the charge against him. In this case the husband distinctly states that he does not charge Mangal with an offence under Section 457 with a view to commit adultery, and the Courts are agreed that no offence under Section 457 with a view to commit theft has been proved. Following the course pursued in the case reported as *Sarwan v. The Empress* ⁽¹⁾, I reduce the sentence to the imprisonment already undergone, and I set aside the fine and alternative imprisonment. Fine, if recovered, to be refunded.

Application allowed.

No. 32.

Before Mr. Justice Chatterji.

RAUSHAN RAI AND OTHERS,—PETITIONERS,

Versus

THE EMPEROR,—RESPONDENT.

} REVISION SIDE.

Criminal Revision No. 598 of 1901.

Penal Code, Section 406—Criminal breach of trust by banker—Refusal to pay the money due to customer on account of losses sustained in business.

Held, that where the relation between the parties was that of banker and customer, which is in law that of debtor and creditor, the monies due to the customer were due simply as debts, and were fully at the disposal of the banker, and the latter in using them for his own purposes committed no breach of trust in a criminal sense.

Chandu v. Chanda Mal and another ⁽²⁾.

Petition for revision of the order of Khan Abdul Ghafur Khan, Sessions Judge, Mooltan Division, dated 8th May 1901.

Ishwar Das, for petitioners.

The judgment of the learned Judge was as follows :—

CHATTERJI, J.—In this case the accused, who are shopkeepers of Mooltan, have been charged with criminal breach of trust in respect of money deposited with them by the complainants, certain Afghans of Kandahar, and convicted under Section 406, Indian Penal Code, and sentenced to imprisonment for various terms. The complainants' case is that they dealt with the accused for eight or ten years or more, and that they used to come to India in the winter for purposes of trade, and deposit the proceeds of their trade transactions with the accused who struck balances in favour of the complainants individually in their book every year,

25th May 1901.

(1) 41, P. R., 1882, Cr.

(2) 95, P. R., 1885.

and that they now refuse to pay the sums due to complainants which aggregate over Rs. 31,000, pretending that they are ruined and unable to pay their debts. The finding of the lower Courts is that the sums paid into the accused's firm were deposits, and were, therefore, trust money, and the first Court also found that the accused's allegation of having sustained losses in business and failed in consequence is false and is not borne out by their books.

The gist of the offence is dishonest misappropriation or conversion to one's own use property held in trust. Here the accused elaim that the amount deposited with them was due from them as a debt, which they admit being unable to pay. They have, therefore, converted the money received from complainants to their own use, and if they were bound, as the lower Courts find, not to do so, they have acted dishonestly, and they have caused wrongful loss to complainants, and must have intended that result. The crucial test then is was the sum due to complainants owed by the accused as a debt, or was it held by them as trust money for complainants over which they had no right of disposition of any kind ?

There is no independent evidence as to the terms on which moneys were paid into accuseds' shop from time to time by complainants. We have only the *lekha bahi* of complainants and the books of the accused to go by. The balances struck by the accused in complainants' book clearly show that the moneys were due simply as debts. There is nothing in the entries made by the complainants themselves from which a trust may be inferred, and in the absence of proof, no presumption can be drawn in favour of a trust. The circumstances relied on by the Sessions Judge do not justify any such conclusion, and this is so whether any interest was chargeable on the moneys due to complainants or not. Some bankers do not pay any interest at all, though it is an ordinary rule for them in this part of India to allow a small interest on balances in favour of their customers. The learned Sessions Judge holds that no interest was paid, and accepts the complainant Bazid Khan's statement to that effect, but I am not prepared to agree in this view as the words *munafa ziudati* and *uftadgi*, which appear in many of the balances, are probably interest in disguised language, and are not capable of rational explanation otherwise. Bazid Khan admitted the inclusion of these sums in the first Court, but did not ugo the contention which he afterwards put forward in the Sessions Court. The expressions *oftadgi khana*, *az waji uftadgi hai* seem to me to indicate that the item in respect of which they were used

was interest. The first Court's finding about them is a somewhat halting one, and the opinion of the commissioner of accounts may be said to be of the same nature, which appears to show that they are difficult to be explained away. The accused's books may not be well kept, but that fact does not show that the interest which is shown in a separate book was not charged. As I have already said the charging of interest is not absolutely necessary for showing that the dealings were in the nature of a debtor and creditor account. The accused must be held to have acted as the complainants' bankers, and the relation between banker and customer is in Law that of debtor and creditor. *Chandu v. Chanda Mal and another* (1). The word *amanat*, if correctly used by complainants, would not show a trust but merely a deposit. The complainants were bound to prove that the moneys they paid were pure trust deposits which the accused were to keep intact just as they got them. The natural presumption is the reverse, and it is difficult to understand how the accused who were business men would agree to keep complainants' money on these terms. The fact must be satisfactorily established by affirmative evidence, but there is none besides the complainants' bare statements. The defendants' version appears to me to be far more probable, and is supported by the wording of the balances in complainants' book written in accuseds' hand.

A useful test, with reference to the complainants' allegation, is what Article of the Limitation Act would have applied to the case had a civil suit for the recovery of the money been brought? Clearly Section 10 would not have been applicable. The complainants' statements would go to show that an express trust was created each time a balance was struck, but no Civil Court would have held this. The proper Article would have been, I think, Article 57, and there is not sufficient evidence even to show that Article 60 would have governed the case, though that would not have necessarily created a trust of the nature contended for by complainants.

The result is that I must hold that complainants have failed to prove their case, which, under the circumstances, was extremely difficult; that the jural relation between the parties was all along that of banker and customer, that is, of debtor and creditor; that the moneys due to complainants were due simply as debts, and were fully at the disposal of the accused, and that the latter in using them for their own purposes committed no breach of trust.

(1) 95, P. R., 1885.

It is doubtless a hard case for the complainants that their hard-earned savings should thus be lost to them, but this cannot change the nature of the accused's liability. It is also possible that accused have not behaved honestly towards their creditors. But no such inference can be drawn merely on the evidence taken in this case. The complainants by filing a bankruptcy petition under the Punjab Laws Act may have accuseds' accounts carefully overhauled, and get them punished as well, if they have committed acts of dishonesty or unfair dealing. This would be an inexpensive mode of proceeding. They can also obtain a decree and proceed under Chapter XX of the Code of Civil Procedure. But they cannot use the Criminal Court to get accused punished for what, on the face of it, appears to be a mere breach of a civil obligation, cognizable only in the Civil Court.

I accept the application, set aside the convictions of the accused, and direct their discharge from their bail.

Application allowed.

No. 33.

Before Mr. Justice Reid and Mr. Justice Chatterji.

CHHAJJU—PETITIONER,

Versus

THE EMPEROR,—RESPONDENT,

Criminal Revision No. 976 of 1901.

REVISION SIDE. }

Criminal Procedure Code, 1898, Section 395—Sentence of imprisonment in lieu of whipping—Power of District Magistrate to revise the sentence of whipping passed by a 1st class Magistrate of his district.

Held, that the words "the Court which passed the sentence" in Section 395 of the Code of Criminal Procedure do not mean the same officer who inflicted the punishment of whipping originally, and that in the absence of the officer who passed the original sentence, the District Magistrate can be held to be "the Court which passed the sentence."

The Empress v. Chetu (¹), referred to.

Petition for revision of the order of C. H. Atkins, Esquire, District Magistrate, Lahore, dated 14th November 1900.

The judgment of the Court was delivered by

19th Augt. 1901.

CHATTERJI, J.—In this case the accused, who is a confirmed criminal, was, on 15th March 1899, convicted under Section 380, Indian Penal Code, and sentenced to five years' rigorous imprisonment and twenty stripes by Mr. Narain Das, Magistrate, 1st class, Lahore, with powers under Section 50, Criminal Procedure

(¹) 10, P. R., 1889, Cr.

Code. The Superintendent of the Jail having reported that the prisoner was not in a fit state of health to undergo whipping, and Mr. Narain Das having been transferred, the case was taken up under Section 395, Criminal Procedure Code, by the Magistrate of the district, who commuted the sentence to one of rigorous imprisonment for one year.

The accused has applied for revision of this order, and for remission of the additional sentence. The first question for consideration is whether the District Magistrate was competent to revise the sentence, or in other words, whether he was the Court that passed the original sentence within the meaning of Section 395 (1).

In the Empress v. Chetu (1) it was ruled that the "only Court which can act when a sentence of whipping cannot be carried out" * * * is the Court which passed the sentence." In that case it was the District Magistrate who passed the sentence of whipping, and it was he who subsequently revised it. The difficulty in the present case did not then arise.

We agree with the learned Judge, who decided the above case, that the jurisdiction of the Court that passed the sentence of whipping to revise it is not taken away by the mere fact that there was an appeal, unless the sentence itself has been set aside by the Appellate Court. We, however, do not think that it was intended to be laid down in the judgment that the words "the Court which passed the sentence" means the same officer who inflicted the punishment of whipping originally.

Upon a careful consideration of the language of the entire section, we are of opinion that the words are not used in this sense. Had it been so, the impersonal word "Court" would not have been employed, but some other, denoting the *person* who imposed the sentence, such as "Magistrate" or "Officer." The word Court has reference to the scheme of Chapter II of the Code, and the whole expression to the class of Court among those mentioned in that chapter, to which the Court sentencing the accused belonged, or to the Court which discharges the same functions territorially, or otherwise, as that Court. Any construction restricting the sense of the expression to the officer who originally tried and sentenced the accused would make the section unworkable. For, if the officer is dead, or has left the service, or is no longer in the district, the sentence cannot be revised, and as it cannot be carried out, the result is that the accused escapes it altogether. It cannot be the intention of the legislature that the revision of

(1) 10, P. R., 1889, Cr.

sentences of whipping should be left to the accident of the punishing Magistrates being still attached to the district in the same capacity at the time of revision, and that a criminal so sentenced should undergo a commuted sentence, or wholly escape such punishment, according as such Magistrate was, or was not, so employed when the time for revision came. Such a construction would be absurd, and is not necessitated by the language of the section.

The second sub-section of Section 395 appears also to indicate the same thing. The words used are "any Court," which are perhaps inconsistent with the supposition that only one Court was meant to be referred to in the expression used in the preceding sub-section. If that had been intended, the word preferably used would have been "such" instead of "any." Similarly, the last clause of the sub-section seems to postulate the possibility of the powers of the original Court and the revising Court being different. The new sentence is *evidently* limited by the powers of the Court revising the former sentence of whipping. Suppose a Sub-Divisional Magistrate, with first class powers, inflicts a sentence of four months' imprisonment and whipping, and the latter sentence cannot be carried out owing to the physical unfitness of the prisoner, the successor of the Magistrate, if he happens to be a second class Magistrate, cannot pass a sentence of more than two months' imprisonment. Doubtless the clause also provides generally that the provision as to commutation of the sentence of whipping, in the first sub-section, is not to be construed as enlarging the powers of the revising Court, as to infliction of punishment.

We further hold that, in the absence of the officer who passed the original sentence, the District Magistrate can be held to be "the Court which passed the sentence." We do not know if there was, at the time of the commutation in this case, another Court which could be said to be Mr. Narain Das' successor, but the District Magistrate had jurisdiction generally over the whole district, and had all the powers possessed by the former, and he can, therefore, be said to legally represent "the Court which "passed the sentence" under the circumstances.

The accused is an old convict, and we see no reason, therefore, to interfere with the amount of imprisonment inflicted in lieu of the whipping.

The application is accordingly rejected.

Application dismissed.

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The references are to the Nos. given to the cases in the "Record."

No.

A.

ABANDONMENT OF LAND.

Occupancy rights—Abandonment without arranging for cultivation and for payment of rent—Abandonment by minor—Forfeiture of rights.

See Punjab Tenancy Act, Section 38.

ACQUIESCENCE.

See Occupancy Rights, No. 5.

Acts:—

Act XVI of 1887. See Punjab Tenancy Act, 1887.

Act XVII of 1887. See Punjab Land Revenue Act, 1887.

ALLUVION AND DILUVION.

Occupancy rights—Alluvion and diluvion—Rights of occupancy tenants in submerged land on re-appearance—Custom.

See Occupancy Rights, No. 6.

F.

FORFEITURE OF RIGHTS OF OCCUPANCY.

See Punjab Tenancy Act, Section 38.

J.

JURISDICTION OF REVENUE COURT.

Jurisdiction—Jurisdiction of Revenue Courts to re-open matters decided by a competent Civil Court.—Held, that the Revenue Courts are not competent to go behind the decision of Civil Courts and re-open matters already decided by competent judicial authority, or where the claim is based on a Civil Court's decree to enter on enquiries which substantially involve the issue as to whether that decree has been rightly given or not. The Revenue Courts should always accept such a decree and act upon it. GURDAS AND ANOTHER v. HASSAN

The references are to the Nos. given to the cases in the "Record."

No.

L.

LAMBARDAR.

Lambardar—Succession to post of lambardar—Rival claims of the deceased lambardar's paternal grandfather's descendants in the male line, whose ancestors had never held the post—"Primogeniture"—Rules under Punjab Land Revenue Act, 1887—Rule No. 179 (i).—In a case where the claimants to succeed to the office of lambardar were the two descendants in the male line of the paternal grandfather of the last incumbent, the Collector appointed the petitioner as he belonged to the elder branch of the family, but the Commissioner on appeal reversed the order of the Collector, on the ground that the rule of primogeniture was not applicable to the parties, and appointed the present respondent on the ground that he was the representative of the line which had never left the village, whereas the father of the petitioner was absent for more than twelve years. *Held*, that the petitioner should not be prejudiced by the temporary absence of his father from the village, and that in doubtful cases it is more expedient to favour the senior branch as it is more in accordance with the stress laid by the present rules on the rule of primogeniture. *YADU v DANU* 5

LAND REVENUE ACT.

See *Punjab Land Revenue Act*.

LANDLORD AND TENANT.

1. *Suit for produce of land—Rival mortgagees alleging possession—Land occupied without the consent of the landlord.*

See *Punjab Tenancy Act, Section 14*.

2. *Landlord and tenant—Share of—In kankar extracted from tenant's holding.—Held*, that in the case of *batai* paying land *kankar* dug out by an occupancy tenant should be shared between the landlord and tenant in the same proportion as the crop is shared. *GHULAM HUSSAIN v. AZIZ BAKHSH* 9

LIMITATION.

Limitation—Reference under Section 84 (3) of the Tenancy Act, 1887—Plaintiff's estate under Court of Wards—delay in making application—Want of leisure on account of plague—Revision—Material irregularity—Occupancy right—Mortgage of—Death of occupancy tenant without heirs—Right of mortgagee as against landlord.—In a suit by the landlords who were minors, under the Court of Wards, to dispossess the mortgagees on the ground that the occupancy right had become extinguished by the death of the occupancy tenant (mortgagor) without heirs, the first Court (Assistant Collector) dismissed the case as time-barred, on the ground that the limitation began to run from the date of the transfer, which was more than six years before the date of suit. No appeal was preferred from that order. Subsequently the Collector was asked to move the Financial Commissioner under clause (3) of Section 84 of the Tenancy Act to revise the order of the Assistant Collector, and he submitted the case to the Financial Commissioner. The

The references are to the Nos. given to the cases in the "Record."

No.

LIMITATION—concl'd.

defendants objected that the Financial Commissioner ought not to interfere, as the plaintiffs had not availed themselves of the right of appeal, and that the reference was not made until nine months after the case had been decided by the first Court, and that there was no material irregularity.—*Held*, that the excuse of want of leisure on the part of a public officer (which could not be accepted in the case of a private person) administering the affairs of minors at a time when plague was prevalent in his district should be accepted as a sufficient cause for the delay.—*Held, also*, that the application of a rule of limitation which in fact does not apply to the case at all amounts to a material irregularity.—*Held, further*, that the plaintiffs were entitled to a decree as the interest of the mortgagee could be no greater or last longer than that of the mortgagor, and that the mortgagor's interest having come wholly to an end by reason of his death without heirs the mortgagee's interest ceased with it even if the mortgage was made with the landlord's knowledge. NARINDAR SINGH v. LEHNA SINGH

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M.

MUTATION OF NAMES.

See *Punjab Land Revenue Act, 1887, Section 37.*

O.

OCCUPANCY RIGHTS.

1. *Abandonment of—*

See *Punjab Tenancy Act, Section 38.*

2. *Transfer of right of occupancy under Section 5 (1) (c)—Measure of fixing value by the Revenue Officer.*

See *Punjab Tenancy Act, Section 53, No 2.*

3. *Occupancy rights, sale of, by widow—Subsequent birth of a son of the deceased occupancy tenant—Right of landlord to void the sale and for possession—Punjab Tenancy Act, 1887, Sections 59 and 60.*—In a suit by a landlord to cancel a sale of occupancy rights by a widow who was pregnant at the time of the said sale, and who had given birth to a posthumous son, seven months after her husband's death; *held*, that when a posthumous son is born to a deceased occupancy tenant his male lineal descendants fail temporarily only; and the widow's right endures only so long as that failure occurs, and that a son of the deceased occupancy tenant being now in existence, the landlord was not entitled to possession. HANWANTA v. CHOUTH MAL

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4. *Mortgage of—Death of occupancy tenant without heirs—Right of mortgagee as against landlord.*—*Held*, that as the interest of the mortgagee could be no greater or last longer than that of the mortgagor, and that the mortgagor's interest having come wholly to an end by reason of his death without heirs, the mortgagee's interest ceased with it even if the mortgage was made with the landlord's knowledge. NARINDAR SINGH v. LEHNA SINGH

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The references are to the Nos. given to the cases in the "Record."

No.

OCCUPANCY RIGHTS—*contd.*

5. *Occupancy rights—Unauthorised alienation—Acquiescence—Punjab Tenancy Act, 1887, Sections 53 and 56.*—The Full Bench ruling of the Chief Court in *Shankar Das and others v. Sher Zaman* (56, P. R., 1900), alters the law laid down by the same authority in *Lehna v. Ganpat and Kaka* (115, P. R., 1890), so that a registered mortgaged deed does not now necessarily have priority over an unregistered mortgage deed relating to the same property. Decisions passed under the law before this alteration was made must be construed according to the law in force at the time. The mortgagee of an occupancy tenant who had gained priority over other mortgagee of the same tenant in the former state of the law having sold his right to the other mortgagees, it was held that, though the landlords were entitled to have the sale declared void, the priority acquired by the vendor was acquired as against the tenant and the other mortgagees only, and did not give the landlords any right which they would not otherwise have had, as they had acquiesced in the mortgages, they were not entitled to possession. *IBRAHIM v. NATHU* 7

6. *Occupancy rights—Alluvion and diluvion—Rights of occupancy tenant in submerged land on re-appearance—Custom.*—Held, that the general rule in the Punjab is that an occupancy tenant does not lose his right by reason of the land of his holding being submerged. A custom to the contrary may be proved, but such a custom being plainly inequitable very strict proof of its existence should be required before it is acted upon.

Sahib Rai v. Khair Shah (19, P. R., 1876), *Bakhtawar v. Sultan Ahmad* (83, P. R., 1876), *Rutta v. Mal Singh* (122, P. R., 1876), *Sultan Khan v. Syad Muhammad Shah* (59, P. R., 1877), *Lal Shah v. Karim Bakhsh* (96, P. R., 1879), *Murid v. Mussammatt Ram Devi* (127, P. R., 1879), and *Raja and another v. Sarfaraz and another* (152, P. R., 1883), followed. *ROSHAN v. POHLO* 8

7. *Occupancy right—Punjab Tenancy Act, 1868, Section 6, and Punjab Tenancy Act, 1887, Sections 6 and 111—Admission by tenant made previous to 1887 that he was merely tenant-at-will.*—In a case to contest a notice of ejectment, it was proved that at the regular Settlement, 1858, the ancestors of the tenants were recorded as having occupancy rights in the land now in dispute, but that during the revised Settlement in 1880 the tenants entered into an agreement with the landlords admitting that they were mere tenants-at-will.—Held, that before the passing of the present Tenancy Act (XVI of 1887) it was lawful for tenants to surrender their occupancy rights to the landlord, and that the tenants had done so by agreement, and that they were thus undoubtedly tenants-at-will at the date of the passing of the present Tenancy Act, Section 6 of which did not confer on them a status which they had so surrendered.—Held, also, that a mere voluntary admission by a tenant does not operate to deprive him of his right. Revenue Courts, therefore, before refusing to recognise an occupancy right on the ground that the tenant has voluntarily admitted himself to be a tenant-at-will, should satisfy themselves that there

The references are to the Nos. given to the cases in the "Record."

No.

OCCUPANCY RIGHTS—*concl'd.*

has been an actual and valid agreement to relinquish the right. No. 4, P. R., 1896, *Revenue*, considered and affirmed. RAHIM BAKHSI v. RAHIM BAKHSI 10

P.

PUNJAB LAND REVENUE ACT, 1887,

SECTION 37.

1. *Entries in record of right and annual records—Correction of record—Procedure when question of title arises.*—In a case to erase the names of certain occupancy tenants from the annual record and enter the names of the landlords as the cultivating occupants of the land on the ground that the occupancy tenants had abandoned the land for more than one year, which allegation was denied by the occupancy tenants.

Held, that the object of the mutation procedure is to bring the annual record into accordance with facts so far as this can be done by a summary inquiry, when the annual record has been corrected, it is under Section 44 of the Land Revenue Act merely presumed to be true, so that an order in a mutation case does not finally settle any substantive question of right as between the parties. Therefore when a question of title is in issue, it is ordinarily the best and safest plan to refuse mutation, and to refer the parties to the Civil or Revenue Courts as the case may be. HARNAND v. JAMNA 1

2. *Entries in record of rights and annual records—Mutation of names—Construction of decree—Procedure when parties dispute the construction of a decree.*—*Held*, following *Harnand v. Jamna* (1, P. R., 1901, *Rev.*), that a Revenue Officer dealing with a mutation case should decline to go behind the plain language of a decree which is still in force, and which has not been varied or set aside or superseded by any act of parties or a competent authority.

Naubat Rai v. Taj Muhammad (84, P. R., 1885), referred to. HAZARI MAL AND ANOTHER v. JOTI MAL 11

3. *And Section 44—Entries in record of rights and annual records—Mutation of names.*—The mutation procedure is not designed for the final settlement of rights, its object is to bring the annual record into accordance with the facts which are most probably true. Revenue Officers should therefore refuse mutation of names based on alienations *prima facie* void until a decree affirming the validity of the ostensible transfer is obtained. MOMANDA v. FARID AND OTHERS 14

PUNJAB TENANCY ACT, 1868,

SECTION 6.

See *Occupancy Rights*, No. 7.

The references are to the Nos. given to the cases in the "Record."

No.

PUNJAB TENANCY ACT. 1887,

SECTION 6,

And Section 111—Admission by tenant made previous to 1887 that he was merely tenant-at-will.

See *Occupancy Rights*, No. 7,

SECTION 14.

Suit for produce of land—Rival mortgagees alleging possession—land occupied without the consent of the landlord—Landlord and tenant. Plaintiff claimed the produce of certain harvest on the allegation that the defendant had taken from him certain land (of which he was the mortgagee in possession) for cultivation on payment of half the produce; the defendant denied the claim, alleging that he had taken the land from one Budhe Shah, who having been made a defendant in the case by an order of the first Court, supported the defendant's allegation. The plaintiff's mortgage was an unregistered one, dated 19th July 1890 (the registration of which was not compulsory), and mutation of names had been granted in his favour on the 14th June 1895, and he had since that date been shown in the *jamabandi* papers as a mortgagee in possession. The second defendant, Budhe Shah, based his claim on a subsequent registered mortgage, and mutation of names had never been effected in his favour. The first Court ordered the plaintiff to obtain a decree for possession from a Civil Court. On appeal the Collector remanded the case, remarking that the sole issue was whether defendant No. 1 was put in as tenant by the plaintiff or not, and ordered Budhe Shah's name to be struck off the record. Both Courts having found that the defendant had not been put in as a tenant by the plaintiff, *held*, upon the special merits of the case, that as the plaintiff's mortgage was a completed transaction, and had been in force for years, and as the entry in the annual record was in the plaintiff's favour, if any one was to be referred to a Civil Court to establish his claim it should have been the subsequent mortgagee who claims against the plaintiff, and was rightly joined as a defendant by the first Court. The plaintiff must be treated by the Revenue Courts as the mortgagee entitled to possession, and held to be landlord, and Budhe Shah to be a person in possession of the land without the consent of the landlord, and liable to pay rent to the plaintiff under Section 14 of the Tenancy Act, until the subsequent mortgagee had been held by a Civil Court to be entitled to possession.

Shanker Das v. Sher Zaman (56, P. R., 1900) as to priority, when a registered deed is in competition with an unregistered deed, cited with concurrence. GOBIND RAM v. ILAHI

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SECTION 38.

Occupancy rights—Abandonment—Abandonment without arranging for cultivation and for payment of rent—Abandonment by minor—Forfeiture of rights.—Where a minor on coming of age sued for occupancy rights in certain land which, on the death of his father, during his minority, had been handed over by his uncle to the landlords who had themselves cultivated it and received the full profits.

The references are to the Nos. given to the cases in the "Record."

No.

PUNJAB TENANCY ACT, 1887—*concl'd.*

Held, that under the provisions of Section 38 of Act XVII of 1887 the minor's rights were not lost, his minority being a sufficient cause for his failure to cultivate, and the fact of his uncle having handed over the land to the landlords to cultivate was a substantial arrangement, and they took the whole profits of the land for the payment of the rent.

When during the minority of an occupancy tenant his holdings comes without consideration into the hands of his landlords, they must be presumed to stand in a *quasi*-fiduciary position towards the tenant, and are bound to restore his holding to his possession when he comes of age. *IAKHA v. THAKAR DIAL* 2

SECTION 53

1. *And Section 55—Unauthorised alienation of occupancy rights—Acquiescence—*

See Occupancy Rights, No. 5.

2. *Transfer of right of occupancy under Section 5 (1) (c)—Measure of fixing value by the Revenue Officer.—Held*, that the value to be fixed for the purposes of Section 53 of the Tenancy Act is the value of the holding to the tenant at the time when the notice of the tenant's intention to transfer is served on the landlord. The best measure of that value is what the tenant was able to get and was willing to accept at the time. *SOHNA AND OTHERS v. MUHAMMAD BAKHSH* 12

SECTION 59

And Section 60—Sale of occupancy rights by widow—Subsequent birth of a son of the deceased occupancy tenant—Right of landlord to avoid the sale and for possession.

See Occupancy Rights, No. 3.

SECTION 84 (3).

Reference under—Delay in making application.

See Limitation.

R.

RECORD OF RIGHTS.

1. *Entries in record of rights and annual records—Mutation of names.*

See Punjab Land Revenue Act, Section 37, Nos. 2 and 3.

2. *Correction of entries in record of rights and annual records.—Procedure when question of title arises.*

See Punjab Land Revenue Act, Section 37, No. 1.

The references are to the Nos. given to the cases in the "Record."

No.

REVISION.

Revision—Material irregularity.—Held, that the application of a rule of limitation which in fact does not apply to the case at all amounts to a material irregularity. NARINDAR SINGH v. LEHNA SINGH 6

RULES UNDER PUNJAB LAND REVENUE ACT, 1887.

See *Lambardar*.

T.

TENANCY ACT.

See *Punjab Tenancy Act*.

TENANT.

See *Landlord and Tenant*.

See *Punjab Tenancy Act*.

REVENUE JUDGMENTS.

No. 1.

*Before the Hon'ble C. L. Tupper, C.S.I., Financial
Commissioner.*

HARNAND AND ANOTHER,—(DEFENDANTS),—
PETITIONERS,

Versus

JAMNA AND ANOTHER,—(PLAINTIFFS),—RESPONDENTS.

} REVISION SIDE.

Revision No. 212 of 1899-1900.

*Entries in Record of Right and Annual Records—Correction of Record—
Procedure when question of title arises—Punjab Land Revenue Act (XVII of
1887), Section 37 (a).*

In a case to erase the names of certain occupancy tenants from the Annual Record and enter the names of the landlords as the cultivating occupants of the land, on the ground that the occupancy tenants had abandoned the land for more than one year, which allegation was denied by the occupancy tenants.

Held, that the object of the mutation procedure is to bring the Annual Record into accordance with facts, so far as this can be done by a summary inquiry, when the Annual Record has been corrected it is under Section 44 of the Land Revenue Act merely presumed to be true, so that an order in a mutation case does not finally settle any substantive question of right as between the parties. Therefore when a question of title is in issue, it is ordinarily the best and safest plan to refuse mutation and to refer the parties to the Civil or Revenue Courts as the case may be.

*Petition for revision of the order of the Hon'ble Mr. H. C. Fanshawe,
Commissioner of Delhi, dated 8th March 1900.*

The following judgment was delivered by

THE FINANCIAL COMMISSIONER.—The claim in this case is to erase the names of certain occupancy tenants from the Annual Record and enter the names of the landlords as the cultivating occupants of the land. 26th Octr, 1900.

The case for the landlords is that the tenants have not cultivated since the famine year 1878, and that the entry of one or more of them as in cultivating possession in 1896-97 is fraudulent and incorrect. It is contended that the occupancy right has been extinguished under Section 38 of the Tenancy

Act, the tenants not having cultivated the land for, at any rate, the last two years.

There is also a suggestion, not fully examined, that the tenants have sold their rights to one Mannu and that this speculative purchase accounts for the patwari having made a false entry in 1896-97, and for the revival of a claim which had slept for nearly twenty years.

The Tahsildar of Karnal allowed the mutation, but the Collector on the ground that the entry of 1896-97 was inexplicable, if it was true that the tenants had not cultivated for twenty years, reversed this order and maintained the previous entry.

On appeal the Commissioner directed further inquiry, and when the results of that inquiry were before him passed the following order:—

“The report of the Tahsildar makes it quite clear, I think, “that the possession of the occupancy tenants has been lost, and “that the owners are entitled to the mutation sought under “Section 37 of the Land Revenue Act, and Section 38 of the “Tenancy Act. It is shown that only Harnand of the occupancy “tenants remained in the village and all the others left it. The “entry of 1896-97 was clearly an improper one, and it ought to “have been amended in accordance with the orders of the Tahsil- “dar. Appeal accepted and mutation desired, and as above “detailed, ordered.”

Now having regard to the nature of mutation proceedings, I am of opinion that this order is wrong in principle and further that the Commissioner's intermediate order was also wrong, and that the proper course in this case was to uphold the order of the Collector disallowing the mutation and that without further inquiry.

The object of the mutation procedure is to bring the Annual Record into accordance with facts so far as this can be done by a summary inquiry. When the Annual Record has been corrected it is under Section 44 of the Land Revenue Act merely presumed to be true, so that an order in a mutation case does not finally settle any substantive question of right as between the parties concerned; it merely raises a presumption in favour of one side or the other.

The Legislature assumes that the Record of Rights has been prepared with sufficient care and is very chary of allowing its alteration. If the Commissioner's order could be

upheld at all the only provision under which it could be upheld is Section 37 (a) of the Land Revenue Act which allows the making of entries "in accordance with facts proved or admitted to have occurred."

The facts in this case are not admitted and, even assuming the facts proved to be such as are stated in the Commissioner's order, the question would remain whether Harnand was in cultivating occupancy of the holding in suit and, if so, whether he cultivated on behalf of the other occupancy tenants. Moreover, the contention raised by the tenants at one stage of the proceedings that the landlords prevented them from cultivating, has not been fully disposed of.

Now, I do not consider that the elaborate inquiry necessary to investigate points such as these should be made in a mutation case. When a question of title is in issue, such as that in the present case, *viz.*, whether the occupancy right has been extinguished under Section 38 of the Tenancy Act, it is ordinarily the best and safest plan to refuse mutation and refer the parties to the Civil or Revenue Court, as the case may be. The amendment of the record will not close the door of litigation, and the work done executively may have to be done all over again for the purpose of obtaining a judicial decision. If the Revenue officers doing mutation work are to make investigations such as have already been made in this case the business of mutation, which ought to be very rapidly performed, will be in danger of coming to a standstill.

When the Commissioner perceived that further inquiry was necessary to explain the entry of 1896-97, in view of which the Collector had passed his order, it was perhaps by a very natural impulse that he ordered such further inquiry to be made. The impulse was one which, in my judgment, should have been resisted. I quite agree that for any final decision of the dispute between the parties further inquiry was indispensable, but for that very reason, I think it would have been right to refuse the mutation and refer the parties forthwith to the Courts which alone could pronounce conclusively between them.

I accept the application, set aside the order of the Commissioner and restore that of the Collector by which the mutation was disallowed.

Application allowed.

No. 2.

Before the Hon'ble C. L. Tupper, C. S. I., Financial Commissioner.

REVISION SIDE. {

LAKHA,—(PLAINTIFF),—PETITIONER,

Versus

THAKAR DIAL AND ANOTHER,—(DEFENDANTS),—
RESPONDENTS.

Revision No. 205 of 1899-1900.

Occupancy rights—Abandonment—Abandonment without arranging for cultivation and for payment of rent—Abandonment by minor—Forfeiture of rights—Punjab Tenancy Act, 1887, Section 38.

Where a minor on coming of age sued for occupancy rights in certain land which on the death of his father, during his minority, had been handed over by his uncle to the landlords who had themselves cultivated it and received the full profits.

Held, that under the provision of Section 38 of Act XVI of 1887, the minor's rights were not lost, his minority being a sufficient cause for his failure to cultivate, and the fact of his uncle having handed over the land to the landlords to cultivate was a substantial arrangement, as they took the whole profits of the land, for the payment of the rent.

When during the minority of an occupancy tenant his holding comes without consideration into the hands of his landlords, they must be presumed to stand in a *quasi-fiduciary* position towards the tenant, and are bound to restore his holding to his possession when he comes of age.

Petition for revision of the order of F. Yewdall, Esquire, Collector of Kangra, dated 16th April 1900.

The following judgment was delivered by

3rd Nov. 1900.

THE FINANCIAL COMMISSIONER.—The oral evidence in this case is worthless; but having regard to what was believed by the Courts below and to the statements made by the parties in my presence, I find the facts to be these:—

Narinjan and Hukmi were brothers and occupancy tenants, and Narinjan died about twenty years ago leaving a minor son, Lakha, the plaintiff, then aged about 4. Hukmi continued to cultivate his own share of the occupancy holding, but being unable to do more made over Lakha's share to the landlords, who have cultivated it and taken the profits ever since. Neither Hukmi nor Lakha was ever in cultivating occupancy of the land in suit. At one time Lakha was a servant of the landlords, but this is immaterial. He went off from Kangra to Simla to his father-in-law's people, and was away at Simla probably for six or seven years. On return he has claimed occupancy right with

possession in a part only of the share of the holding which according to the records he should have inherited from his father.

On these facts the Courts below, following Chief Court's ruling—*Jumna and others v. Ahmad Ali Khan* ⁽¹⁾, have held that the landlords were not cultivating on the tenant's behalf, and that the tenancy has been abandoned and extinguished under Section 38 of the Act.

I have referred to the former decisions (*Ruttun Singh v. Esher Singh and another* ⁽²⁾, *Chogatha and others v. Jiwan Singh and others* ⁽³⁾, *Idu and Fattu v. Nihal Singh* ⁽⁴⁾, and *Karm Din v. Jiwa* ⁽⁵⁾), but they are all inapplicable, because they are all prior to the passing of the present Tenancy Act in 1887. Section 38 of the present Act was new and the case before me must be decided with regard to the language and intention of the provisions of that section.

The decisions of the Courts below appear to me to be erroneous under the law as it now stands; and inequitable, inasmuch as they open a door to landlords to take advantage of the minority of a tenant to destroy his occupancy right; that is to do him a wrong when his circumstances specially call for their lenient consideration.

To constitute abandonment carrying with it extinction of the right of occupancy under Section 38, three things are necessary, and all these must exist in combination with each other: these are (1) that the tenant fails for more than one year to cultivate his tenancy either by himself or some other person; (2) that he so fails without sufficient cause; and (3) that he fails to arrange for the payment of the rent of the tenancy as it falls due.

If a tenant has sufficient cause for his failure to cultivate there is no abandonment; so also if he fails to cultivate but arranges for the payment of the rent as it falls due, abandonment does not occur.

As to the intention of the section the essential point for consideration is whether the landlord has sustained any injury moving from the tenant which would justify the penalty of extinction of the right. If the landlord has, as in this case, sustained no injury whatever, the Courts should require extremely strict proof as to all the three points above noted before proceeding to give the landlord a decree.

(1) 156, P. R., 1884, Civ.

(2) 5, P. R., 1872, Civ.

(3) 103, P. R., 1876, Civ.

(4) 12, P. R., 1879, Civ.

(5) 111, P. R., 1889, Civ.

Applying these remarks to the case before me, I find that the minority of Lakha was a sufficient cause for his failure to cultivate and, that, through his uncle Hukmi, who must be presumed to have acted in his interest, he did substantially arrange for the payment of rent as it fell due; inasmuch as he left the cultivation in the hands of the landlords and they thus secured for themselves the full profits of the land.

When during the minority of an occupancy tenant his holding comes without consideration into the hands of his landlords, they are exposed to a temptation to defraud him of his rights. It must, therefore, be presumed in the absence of any satisfactory evidence to the contrary that in such cases the landlords stand in a *quasi-fiduciary* position towards the tenant and are bound to restore his holding to his possession when he comes of age.

I reverse the orders of the Courts below and grant the plaintiff a decree for the occupancy right and possession of the land claimed. The landlords were not, in my opinion, justified in resisting this claim and will pay costs throughout.

Application allowed.

No. 3.

Before the Hon'ble C. L. Tupper, C.S.I., Financial Commissioner.

HANWANTA,—(PLAINTIFF),—PETITIONER,

Versus

CHOUTH MAL AND ANOTHER,--(DEFENDANTS),—
RESPONDENTS.

} REVISION SIDE.

Revision No. 53 of 1899-1900.

Occupancy rights, sale of, by widow—Subsequent birth of a son of the deceased occupancy tenant—Right of landlord to avoid the sale and for possession—Punjab Tenancy Act, XVI of 1887, Sections 59 and 60.

In a suit by a landlord to cancel a sale of occupancy rights by a widow who was pregnant at the time of the said sale, and who had given birth to a posthumous son, 7 months after her husband's death.

Held, that when a posthumous son is born to a deceased occupancy tenant his male lineal descendants fail temporarily only, and the widow's right endures only so long as that failure occurs, and that a son of the deceased occupancy tenant being now in existence, the landlord was not entitled to possession.

*Petition for review of the order of the Hon'ble S. S. Thorburn, Financial Commissioner, Punjab, dated 22nd November 1899.**

Krishen Singh for Chouth Mal, applicant.

Sangam Lal, for Hanwanta, landlord.

After hearing arguments of the respective counsel for the parties on the grounds set forth in the petition for review the following judgment was delivered by

THE FINANCIAL COMMISSIONER.—It appears that Raju died on 16th April 1900. March 13th, 1892; his widow, Mussammat Gunga, sold her interest to Chouth Mal on August 18th, 1892. At that time she was pregnant, and seven months after her husband's death she gave birth to a son.

It is contended that under Hindu Law the son was in existence from the moment of conception, and that in effecting the sale the mother was acting in his interest.

I do not think that there is any necessity to resort to this fiction in order to interpret the Tenancy Act; in which, no doubt, there is no express reference to the case of a posthumous son.

The date of the widow's re-marriage could not be stated, but it was admitted that her second marriage occurred not very long after her husband's decease.

I certainly agree with my predecessor that a widow holding as an occupancy tenant cannot, if she can alienate at all, alienate

* The Judgment of which a review was prayed is reported as No. 2 P. R., 1900, Rev. — Ed. P. R.

more than her own limited interest. The re-marriage appears to have occurred so soon after her husband's death as to render nugatory the acts of acquiescence by way of receiving rent which are alleged.

But I hold further that the widow's interest ceased on the birth of the son. Under Section 59 (1) (b) of the Act, the right of the widow arises only on failure of the male lineal descendants of the occupancy tenant, deceased. When a posthumous son is born to the deceased his male lineal descendants fail temporarily only and the widow's right endures only so long as that failure occurs. It follows that on the birth of a son the widow's limited interest ceased, and the purchaser, who had only bought that interest, was no longer entitled to anything.

The question then remains—who was entitled to come in, the landlord or the son of the deceased? It so happens that in this particular instance this very point is already being tried in a separate suit.

Chatru, the son of Raju, has sued Hanwanta for possession of the occupancy holding in the Court of Mr. Isa Charan Chandu Lal, and April 26th is fixed for the hearing.

The result of that case will be awaited before a final order is passed in this review.

The application was finally disposed of by the following order :—

29th Oct. 1900.

FINANCIAL COMMISSIONER.—The Civil Court has found that Chatru, minor, is the son of Raju, and has given him a decree for occupancy right in and possession of the land in dispute. An appeal from this decision is pending in the Court of the Divisional Judge, but there is no need to await the result of it.

Should the order of the first Civil Court be reversed or modified on appeal, that would be ground for a further application for review; but I need not anticipate that such will be the result of the proceedings in appeal.

Chonth Mal was not a party in the civil case. If Chatru refuses to ratify the sale to Chonth Mal, the latter will be able to seek any remedy to which he may be entitled in a Civil Court. I have already held in my order of 16th April 1900 (of which this order should be taken to be a continuation) that any sale made by the widow covered only her limited interest, and that such interest ceased when Chatru, the posthumous son, was born.

The order of my predecessor, dated 22nd November 1899, must be modified with reference to the facts which have since been

shown to exist. A son of the deceased occupancy tenant being in existence, the landlord is not entitled to possession. The application for review is therefore allowed, and the claim of Hanwanta to possession is rejected.

Application allowed.

No. 4.

Before the Hon'ble C. L. Tupper, C. S. I., Financial Commissioner.

GOBIND RAM,—(PLAINTIFF),—PETITIONER,

Versus

ILAHJI,—(DEFENDANT),—RESPONDENT.

} REVISION SIDE.

Revision No. 247 of 1899-1900.

Suit for produce of land—Rival mortgagees alleging possession—Land occupied without the consent of the landlord—Landlord and tenant—Punjab Tenancy Act, 1887, Section 14.

Plaintiff claimed the produce of certain harvest on the allegation that the defendant had taken from him certain land (of which he was the mortgagee in possession) for cultivation on payment of half the produce; the defendant denied the claim, alleging that he had taken the land from one Budhe Shah, who having been made a defendant in the case by an order of the first Court, supported the defendant's allegations.

The plaintiff's mortgage was an unregistered one, dated 19th July 1890 (the registration of which was not compulsory), and mutation of names had been granted in his favour on the 14th June 1895, and he had since that date been shown in the *jamabandi* papers as a mortgagee in possession. The second defendant, Budhe Shah, based his claim on a subsequent registered mortgage, and mutation of names had never been effected in his favour.

The first Court ordered the plaintiff to obtain a decree for possession from a Civil Court. On appeal the Collector remanded the case, remarking that the sole issue was whether defendant No. 1 was put in as tenant by the plaintiff or not, and ordered Budhe Shah's name to be struck off the record. Both Courts having found that the defendant had not been put in as a tenant by the plaintiff.

Held, upon the special merits of the case, that as the plaintiff's mortgage was a completed transaction and had been in force for years, and as the entry in the annual record was in the plaintiff's favour, if any one was to be referred to a Civil Court to establish his claim, it should have been the subsequent mortgagee who claims against the plaintiff and was rightly joined as a defendant by the first Court. The plaintiff must be treated by the Revenue Courts as the mortgagee entitled to possession and held to be landlord, and Budhe Shah to be a person in possession of the land without the consent of the landlord and liable to pay rent to the plaintiff under Section 14 of the Tenancy Act, until the subsequent mortgagee had been held by a Civil Court to be entitled to possession.

Chief Court Ruling in *Shankar Das v. Sher Zaman* ⁽¹⁾ as to priority when a registered deed is in competition with an unregistered deed cited with concurrence.

Application for revision from the order of J. R. Drummond, Esquire, Collector, Gurdaspur, dated 13th March 1900.

The facts of the case and points of law are fully stated in the following judgment delivered by

18th Nov. 1900.

FINANCIAL COMMISSIONER.—In this case Gobind Ram, plaintiff, holds an unregistered mortgage of the land of which rent is claimed. This document is dated 19th July 1890 and registration was not necessary, the consideration being Rs. 49.

Mutation of names was granted in Gobind Ram's favour on 14th June 1895, and he has been since continuously shown in the *jamabandi* as the mortgagee. Ilahi, defendant, came into the annual record in 1896-97 as a tenant-at-will under the mortgagee paying half *batai*.

It is a moot point whether Gobind Ram ever had possession, the mortgagor, Khera, being shown in cultivating occupancy from 1894-95 to 1896-97. It is, however, material to note that in the *dakhil kharaj* proceedings the mortgagor and the lambardar testified to Gobind Ram's possession as mortgagee.

Budhe Shah holds a subsequent registered mortgage which he has assigned to Mahinda and Jiwan, this includes the land in suit and other land also. In exercise of the rights claimed by him under this mortgage Budhe Shah received the produce for the harvests in respect of which the claim is made. He says that he paid the revenue. I have no doubt that Ilahi, the actual cultivator, was put in by Budhe Shah, to whom, Ilahi says, he paid the rent.

These being the facts, the real question is can Gobind Ram follow the produce into the hands of Budhe Shah?

The Courts below have dealt with the case as though the sole issue were whether Ilahi was put in as tenant by Gobind Ram; and they have found this issue against Gobind Ram and have dismissed his claim.

In so dealing with the case the lower Courts have, in my opinion, erred in two ways:

First, they have not attached sufficient weight to the entries in the *jamabandi*.

Secondly, they have erroneously struck out Budhe Shah's name after he had been rightly joined as a defendant by the first Court.

(1) 56 P. R., 1900.

As to the first point, the records being entirely in Gobind Ram's favour, if any one has to be sent to a Civil Court to establish his claim it should not be Gobind Ram, but the subsequent mortgagee who claims against him. The first mortgage was a completed transaction, and had been in force for years. If Gobind Ram is to be deprived of the benefit of it, this should only be done if Budhe Shah or any one claiming under him can establish the claim in a Civil Court.

As to the second point, *Lehna v. Ganpat* ⁽¹⁾ has been set aside by the recent Full Bench decision in *Shankor Das v. Sher Zaman* ⁽²⁾. In that decision it has been held "that when it is proved " that a subsequent encumbrancer under a registered conveyance had " notice of a valid prior unregistered encumbrance and of possession " by such encumbrancer or of such conveyance without possession, " the Courts are not bound to interpret the Registration Act, 1877, " Section 50, so as to defeat the title of the prior encumbrancer." It " was held further, per Roberston, Judge, that " when it is shown " that the original transferee was in possession under his transfer " at the time of the second conveyance, it is to be presumed that " the second grantee had notice of the prior title or interest."

These views have my full concurrence; but I would add that the case of a mortgage differs materially from the case of a sale. If A. sells by unregistered deed to B. and subsequently sells the same property by registered deed to C., the presumption that the second transaction is a fraud is extremely strong, because at the time of the second transaction A. has already parted with his whole interest in the property. But if A. merely mortgages to B. and then by registered deed mortgages the same property to C., it does not at all follow that the transaction is a fraudulent or even an improper one; because in the first transaction the mortgage may have been made for a mere fraction of the value of the property.

Budhe Shah before me asserts that he had no notice of the prior mortgage of Gobind Ram, inasmuch as the mortgagor Khara was in possession.

It may be that Budhe Shah may be able to establish his right to hold as mortgagee in preference to Gobind Ram, but till he has done so, Gobind Ram must be treated by the Revenue Courts as the mortgagee entitled to possession. In virtue of his subsisting mortgage Gobind Ram must be held to be the landlord, and Budhe Shah, as regards the harvests included in the claim, must be held to be a person in possession of the land occupied without the consent of the landlord. Budhe Shah is therefore liable to pay rent to Gobind Ram under Section 14 of the Tenancy Act.

(1) 115, P. R., 1890.

(2) 56, P. R., 1900.

Whilst I am of opinion that the above decision meets the requirements of justice and convenience in the particular case (in which it is impossible to stave off all further litigation, Budhe Shah having transferred his mortgage to third parties), I do not desire to lay down the general rule that when a prior mortgagee holding a mortgage deed, of which the registration is not compulsory, is supported by the entries in the annual record or the record of rights, a subsequent mortgagee of the same land holding a registered mortgage deed must always be put to his proof in a Civil Court before the Revenue Courts can take cognizance of his claim. Such a rule would not be consistent with the duty of the Revenue Courts to fully investigate and decide all issues arising between the parties before them in Revenue Court cases which are not of a summary description. But, as in the present instance, I think it may often appear that a claim based on a second registered mortgage deed put forward in competition with a first unregistered mortgage deed is one which can be better dealt with by a Civil Court than by a Revenue Court; and if a decision were to proceed on that view I should be reluctant to interfere with it. The proper course is for the second mortgagee to apply for mutation of names, and if his application is rejected, he would then be put to his proof in a Civil Court, and if he obtained his decree the record would be altered accordingly.

The name of Budhe Shah is restored to the file as that of a defendant, and the case is remanded for re-decision with reference to the above remarks. The Courts below will have to decide what is due from Budhe Shah to Gobind Ram for the harvests in question, and whether Budhe Shah paid the revenue for these harvests. If he did, the amount so paid should be deducted from the amount due by him. I observe that in the receipts for land revenue held by Gobind Ram there is a break just exactly at this period, and there is other evidence which leads me to suppose that Budhe Shah probably did pay the revenue. No order as to costs.

Application allowed: cause remanded.

No. 5.

Before the Hon'ble C. L. Tupper, C.S.I., Financial
Commissioner.

YADU,—APPELLANT,

Versus

DANI,—RESPONDENT.

} APPELLATE SIDE.

Appeal No. 47 of 1899-1900.

Lambardar—Succession to post of lambardar—Rival claims of the deceased lambardar's paternal grandfather's descendants in the male line, whose ancestors had never held the post—"Primogeniture"—Rules under Punjab Land Revenue Act, 1887—Rule No. 179 (i).

In a case where the claimants to succeed to the office of lambardar were the two descendants in the male line of the paternal grandfather of the last incumbent, the Collector appointed the petitioner as he belonged to the elder branch of the family, but the Commissioner on appeal reversed the order of the Collector, on the ground that the rule of primogeniture was not applicable to the parties, and appointed the present respondent on the ground that he was the representative of the line which had never left the village, whereas the father of the petitioner was absent for more than twelve years.

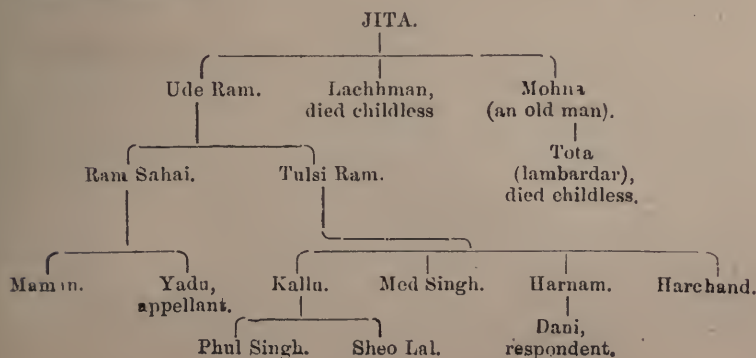
Held, that the petitioner should not be prejudiced by the temporary absence of his father from the village, and that in doubtful cases it is more expedient to favour the senior branch, as it is more in accordance with the stress laid by the present rules on the rule of primogeniture.

*Appeal from the order of the Hon'ble Mr. H. C. Fanshawe,
Commissioner of Delhi, dated 26th April 1900.*

Beni Parshad, for appellant.

Duni Chand, for respondent.

The following table shows the relationship of the parties, and the other material facts of the case are fully stated in the judgment delivered by



25th Oct. 1900.

FINANCIAL COMMISSIONER.—The facts are not absolutely undisputed, but I find them to be as follows:—

Many years ago, so long ago that neither Yadu nor Dani could say when, the village of Sukhrali was held in farm. When the village was released from farm Ude Ram, the eldest of the three sons of Jita (see pedigree-table above) had already died. Lachhman, the son next in age, was either actually appointed lambardar or did the work; he died childless. Eventually Mohna, the third son of Jita, became lambardar, and was in turn succeeded by his son Tota, who has now died. The claim of Mehr Chand, through an alleged adoption, which has been found not to have occurred, is immaterial now, and need not be further referred to.

The question is, who is to succeed Tota, the lambardari never having been held by Ude Ram's branch of the family?

If in this branch the rule of primogeniture is to be applied, then Yadu will succeed; for his father Ram Sahai was the elder brother of Tulsi Ram, the grandfather of Dani.

If it is not necessary to apply the rule of primogeniture, then, although Dani seems the better man of the two, I am very doubtful whether he should be appointed. Preference shown to the junior line might be an incentive to future quarrels not compensated by a better choice in a single generation. I do not attach much weight to the reasons given for excluding Yadu. There is no doubt that Ram Sahai was just as much one of the old Jat proprietors of the village as Tulsi Ram. He went off and lived in his father-in-law's house in Jaurasi, some 20 *kos* away, for twelve or more years; and on his death his sons claimed and were allowed what they have got, not as a gift but as a compromise. In my opinion these circumstances should not prejudice Yadu; and if I were to uphold the Commissioner's decision I should do so on the distinct grounds that Dani is the better man, and that it is not desirable in such cases to interfere with the discretion of Commissioners more than can be helped.

The limits of relationship within which the rule of primogeniture must be applied are laid down in Revenue Rule 179 (i) (a). Both claimants, however, are descendants in the male line of the paternal grandfather of the last incumbent. When it was suggested that this might be immaterial in the particular case, as no ancestor of either claimant had ever held the lambardari, Mr. Beni Parshad replied that in the rule there is no proviso similar to that in Section 59 (1) of the Tenancy Act, which requires that the common ancestor should have held the land.

Before I decide this case search should be made for anything which throws light on the intention entertained in framing Revenue Rule 179 (i) (a). If it can be shown to have been clearly the intention to apply the rule of primogeniture even when the lambardari is about to pass to a branch which never held it before, that will decide the case in favour of Yadu, for there is no sufficient reason to consider either candidate disqualified.

The final judgment of the Financial Commissioner was as follows :—

FINANCIAL COMMISSIONER.—The search directed has not elicited anything which bears upon the case. 24th Nov. 1900.

I have held that Yadu should not be prejudiced by the temporary absence of Ram Sahai from the village. Yadu belongs to the senior branch, and in doubtful cases it is more expedient to favour that branch because the preference shown to it is more likely to be acquiesced in without village quarrels. Finally Yadu is in kinship one degree nearer to the deceased than Dani.

It appears to me to be more in accordance with the stress laid by the present rules on the rule of primogeniture to appoint Yadu than Dani. Had it not been for the accident that no common ancestor ever held the lambardari Yadu's claim would have been complete.

On these grounds I set aside the Commissioner's order and restore that of the Collector.

The case was a very disputable one. No order as to costs.

Revision allowed.

No. 6.

Before the Hon'ble C. L. Tupper, C. S. I., Financial Commissioner.

NARINDAR SINGH AND OTHERS,—(PLAINTIFFS),—
PETITIONERS,

Versus

LEHNA SINGH AND OTHERS,—(DEFENDANTS),—
RESPONDENTS.

} REVISION SIDE.

Revision No. 324 of 1899-1900.

Limitation—Reference under Section 84 (3) of the Tency Act, 1887—Plaintiffs' estate under Court of Wards—Delay in making application—Want of leisure on account of plague—Revision—Material irregularity—Occupancy right—Mortgage of—Death of occupancy tenant without heirs—Right of mortgagee as against landlord.

In a suit by the landlords who were minors under the Court of Wards to dispossess the mortgagees on the ground that the occupancy right had become extinguished by the death of the occupancy tenant (mortgagor) without heirs, the first Court (Assistant Collector) dismissed the case as time-barred on the ground that the limitation began to run from the date of the transfer which was more than six years before the date of suit. No appeal was preferred from that order. Subsequently the Collector was asked to move the Financial Commissioner under clause (3) of Section 84 of the Tenancy Act, to revise the order of the Assistant Collector, and he submitted the case to the Financial Commissioner, the defendants objected that the Financial Commissioner ought not to interfere as the plaintiffs had not availed themselves of the right of appeal and that the reference was not made until nine months after the case had been decided by the first Court, and that there was no material irregularity.

Held, that the excuse of want of leisure on the part of a public officer (which could not be accepted in the case of a private person) administering the affairs of minors at a time when plague was prevalent in his district should be accepted as a sufficient cause for the delay.

Held, also, that the application of a rule of limitation which in fact does not apply to the case at all amounts to a material irregularity.

Held, further, that the plaintiffs were entitled to a decree as the interest of the mortgagee could be no greater or last longer than that of the mortgagor, and that the mortgagor's interest having come wholly to an end by reason of his death without heirs the mortgagee's interest ceased with it even if the mortgage was made with the landlord's knowledge.

Case referred by W. De M. Malan, Esquire, Collector, Amritsar, on 24th August 1900, under Section 84 (3), Tenancy Act, 1887.

Sukh Dial, for petitioners.

Turner and Rup Lal, for respondents.

The material facts of this case sufficiently appear from the following judgment:—

29th Dec. 1900.

THE FINANCIAL COMMISSIONER.—The occupancy tenants, Phaggu and others, mortgaged their holding in 1884 to the defendants' predecessors. The landlords, Sardar Narindar Singh and others, are minors under the Court of Wards, and sue to dispossess the mortgagees on the ground that the occupancy right has been extinguished by the death of Phaggu, the last surviving occupancy tenant, without heirs.

The first Court has dismissed the claim as time-barred, counting a six years' limitation from the date of transfer in 1884.

Assuming the law to be as found in *Sher Khan v. Pir Bakhs* ⁽¹⁾ lately cited with concurrence by my predecessor in *Hanwanta v. Ohouth Mal* ⁽²⁾, there is no doubt that the claim of

(1) 79, P. R., 1878, Civ. (2) 2, P. R., 1900, Rev.

the plaintiffs should succeed unless it is really time barred or there is some other valid reason for rejecting it sufficient to outweigh the *prima facie* effect of the judgments just quoted.

Counsel for the defendants,—i. e., for the mortgagees in possession of the occupancy holding, sought to show that the Financial Commissioner's powers of revision had in some way been narrowed by the recent amendment of the Punjab Courts Act by Act XXV of 1899. It is unnecessary to discuss that question in its full extent for the purposes of this case. The expression "material irregularity" has not been altered by the change in the law and after considering the Civil and Revenue rulings, viz., *Thakur Mal v. Ram Nath* ⁽¹⁾, *Sardar Fakir Muhammad Khan v. Kasim* ⁽²⁾, *Shib Dial v. Jhanda Mal* ⁽³⁾, *Gurbakhsh Singh v. Bela* ⁽⁴⁾, *Mula Shah v. Nizam Din* ⁽⁵⁾, *Uttum Singh v. Dharm Singh* ⁽⁶⁾, *Jaimal Singh v. Gupat Mal* ⁽⁷⁾, *Gurditta Mal v. Pal Singh* ⁽⁸⁾, *Jhanda v. Lakha* ⁽⁹⁾, *Roebuck v. Henderson* ⁽¹⁰⁾, *Dipu Mal v. Gokal Chand* ⁽¹¹⁾, *Pandit Rama Kant v. Pandit Ragdeo* ⁽¹²⁾, *Nur Ilahi v. The Municipal Committee, Delhi* ⁽¹³⁾, *Mussammatt Wazir Begam v. Mussammatt Piyari Begam* ⁽¹⁴⁾, *Khushia v. Pira* ⁽¹⁵⁾, *Khushala v. Khushwaqt Rai* ⁽¹⁶⁾, *Gulab v. Bhagwan Singh* ⁽¹⁷⁾, *Daulat Khan v. Mast Ali* ⁽¹⁸⁾, *Fazla v. Lal Singh* ⁽¹⁹⁾, *Lekha Mal v. Muhammad Bakhsh* ⁽²⁰⁾, *Surta v. Imin-ud-din* ⁽²¹⁾, *Hirde v. Darbari* ⁽²²⁾, *Bahadur v. Dul Chand* ⁽²³⁾, and *Chinga v. Mangat Ram* ⁽²⁴⁾. I have no doubt that the application by the first Court to this case of a rule of limitation, which in fact did not apply to it at all, amounts to a material irregularity.

The landlords, having acquiesced in the mortgage by acceptance of rent for many years, had no right to sue till Phaggu died. That was less than six years before the institution of the suit—less therefore than the shortest period of limitation which could on any sound view be applied to this case.

It was next contended that the case should be thrown out because the Court of Wards acting for the minors had never appealed. The minors live in the Hoshiarpur District and the case arose in the Amritsar District. Plague was at the time prevalent

(1) 29, P. R., 1886.

(2) 105, P. R., 1888.

(3) 42, P. R., 1889.

(4) 206, P. R., 1889.

(5) 108, P. R., 1890.

(6) 60, P. R., 1891.

(7) 65, P. R., 1891.

(8) 26, P. R., 1892.

(9) 19, P. R., 1894.

(10) 54, P. R., 1896.

(11) 34, P. R., 1897.

(12) 60, P. R., 1897.

(13) 68, P. R., 1897.

(14) 50, P. R., 1898.

(15) 11, P. R., 1886, Rev.

(16) 7, P. R., 1888, Rev.

(17) 13, P. R., 1890, Rev.

(18) 1, P. R., 1892, Rev.

(19) 6, P. R., 1892, Rev.

(20) 17, P. R., 1892, Rev.

(21) 2, P. R., 1891, Rev.

(22) 5, P. R., 1891, Rev.

(23) 3, P. R., 1893, Rev.

(24) 3, P. R., 1898, Rev.

in the Hoshiarpur District. The excuse for a late reference under Section 84 (3) of the Tenancy Act is want of leisure on the part of the Deputy Commissioner. That could not be accepted in the case of a private person, but in the case of a public officer administering the affairs of minors at a time of plague, I think it should be accepted.

The effect of *Sher Khan v. Pir Bakhsh* ⁽¹⁾ is that, the interest of the mortgagee could be no greater and last no longer than that of the mortgagor and “that the mortgagor’s interest having come “wholly to an end by reason of his death without heirs, the mortgagees’ interest ceased with it even if the mortgage was made with “the proprietor’s knowledge or was afterwards assented to by him.”

This ruling was passed under the Act of 1868, but I cannot find anything in the Act of 1887 which is opposed to it. If Section 59 had made the occupancy right devolve on the landlord when the heirs of the occupancy tenant fail, I might have held that the landlords came in subject to any incumbrance in which they have themselves acquiesced and would not be entitled to possession till they had paid off the mortgage debt. But though much might be said for the equity of such a decision, it would be opposed to the unequivocal language of Section 59 (4). There is no devolution of the occupancy right upon the landlord of an occupancy tenant deceased without heirs. The law is that the occupancy right is extinguished. There cannot be a subsisting mortgage of a right which has ceased to exist, and I must therefore hold that the landlords are entitled to the possession for which they sue. Decree will be passed accordingly. No orders as to costs.

Application allowed.

No. 7.

Before the Hon'ble C. L. Tupper, C.S.I., Financial Commissioner.

REVISION SIDE. { IBRAHIM AND OTHERS,—(DEFENDANTS),—PETITIONERS,
Versus
NATHU AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Revision No. 209 of 1899-1900.

Occupancy rights—Unauthorised alienation—Acquiescence—Punjab Tenancy Act, 1887, Sections 53 and 56.

The Full Bench ruling of the Chief Court in *Shankar Das and others v. Sher Zaman* ⁽²⁾ alters the law laid down by the same authority in

(¹) 73, P. R., 1878. (²) 56, P. R., 1900, P. B.

Lehna v. Ganpat and Kaku ⁽¹⁾ so that a registered mortgage deed does not now necessarily have priority over an unregistered mortgage deed relating to the same property.

Decisions passed under the law before this alteration was made must be construed according to the law in force at the time.

The mortgagee of an occupancy tenant who had gained priority over other mortgagees of the same tenant in the former state of the law having sold his right to the other mortgagees, it was *held* that though the landlords were entitled to have the sale declared void, the priority acquired by the vendor was acquired as against the tenant and the other mortgagees only, and did not give the landlords any right which they would not otherwise have had. As they had acquiesced in the mortgages, they were not entitled to possession.

Petition for revision of the order of A. Anderson, Esquire, Commissioner of Jullundur, dated 22nd March 1900.

Golaknath, for respondents.

The material facts of this case appear from the following judgment:—

THE FINANCIAL COMMISSIONER.—This is a very peculiar case 30th Dec. 1900.
owing to the number of mortgages of the occupancy holding to which it relates and to the circumstance that since the date of the decree on which it turns the law relating to the priority of registered instruments has been substantially altered by a Full Bench ruling of the Chief Court.

I agree with the Commissioner that the sale by Bhagwan Das of his rights under the decree of 1898 must be set aside; but I differ as to the effect of the cancellation of that sale.

It is true that if it be assumed that the mortgagees have no right except such as they derive from Bhagwan Das, the transfer of possession to the landlords follows as a logical consequence. But this consequence is so unjust that nothing short of an explicit declaration of the law would compel me to hold it to be inevitable.

The law, however, is far from being explicit, and I think that on the explanation I am about to give an equitable decision may be arrived at.

The facts are complicated and must be briefly stated. Ghaniya Lal, occupancy tenant of 36 *kanals* 11½ *marlas*, in June 1887 mortgaged 20 *kanals* by two unregistered deeds to Suba, Ibrahim and Ismail. These mortgages were with possession.

He then executed a registered collateral mortgage of the whole holding in favour of Bhagwan Das in April and July 1888.

⁽¹⁾ 115, P. R., 1890.

In 1891 the landlords sued to set aside the unregistered mortgage, and their suit was dismissed in February 1892 on the ground of acquiescence.

In July 1892 the tenant mortgaged the 20 *kanals* which were the subject of the suit just mentioned to one Kashi Ram. This mortgage was registered, and Ibrahim and Ismail purchased Kashi Ram's right.

In August 1888 the tenant mortgaged 1 *kanal* and 5 *marlas* to Shahab-ud-din, in October 1894 7 *kanals* and 17 *marlas* to Amir Bakhsh, and on some date, which I do not know, but later than that of the collateral mortgage to Bhagwan Das, 7 *kanals* 9½ *marlas* to Rahman.

Bhagwan Das sued the tenant and the mortgagees for possession on the ground that the conditions of his mortgage had not been fulfilled; and he got a decree on 6th April 1898. This was given in pursuance of the Chief Court ruling *Lehna v. Gunpat* ⁽¹⁾ which has been overruled by the recent Full Bench decision *Shankar Das v. Sher Zamin* ⁽²⁾. It was held that the mortgage to Bhagwan Das had priority over the unregistered mortgages of 1887, because the deed was registered, and over the other mortgages because they were of later dates.

If the recent Chief Court ruling had then been in force, it is improbable that the mortgage of Bhagwan Das would have been given priority over the mortgages of 1887. The recent ruling shows how inequitable is the doctrine of priority after actual or constructive notice, and how nearly it approaches to the direct encouragement of fraud.

I admit that, as contended before me, the decree of 1898 must be construed in accordance with the law in force at the time.

So far then as the rights of the respective mortgagees are concerned, I must allow that none of the mortgagees have any *locus standi* as against Bhagwan Das.

But it does not seem to me to follow that the mortgages which must be treated as nullities, so far as he is concerned, must necessarily be so treated as against others not holding any registered deeds entitling them to priority.

The mortgagees do not appear to have been disturbed in possession, and they are of course holders for value. The landlords have not impeached the mortgages except in the suit of 1891 in which their claim was rejected. They have stood by and allowed these mortgages to be made, and now they seek to take

(1) 115, P. R., 1890, (F. B.)

(2) 56, P. R., 1900, (F. B.)

advantage of the position assigned to Bhagwan Das by a view of the law pronounced by the highest provincial authority to be inequitable.

To that I cannot assent. I hold that the effect of cancelling the sale made by Bhagwan Das is to put all concerned in exactly that position which they occupied when the decree of 1898 was passed; and I hold further that that decree though conclusive as between the parties, *viz.*, Bhagwan Das and the tenant and his mortgagees, did not confer on the landlords any rights over and above those which they would have had if the decree had never been given.

It follows that the landlords are not entitled to dispossess the mortgagees: and while a formal order must be passed cancelling the sale made by Bhagwan Das, so much of the Commissioner's order as awards possession to the landlords must be set aside.

No order as to costs.

Application allowed.

No. 8.

*Before the Hon'ble C. L. Tupper, C.S.I., Financial
Commissioner.*

ROSHAN AND OTHERS, —(PLAINTIFFS),— PETITIONERS,
Versus

POHLO,—(DEFENDANT),—RESPONDENT.

Revision No. 266 of 1899-1900.

Occupancy rights—Alluvion and diluvion—Rights of occupancy tenant in submerged land on re-appearance—Custom.

Held, that the general rule in the Punjab is that an occupancy tenant does not lose his right by reason of the land of his holding being submerged. A custom to the contrary may be proved, but such a custom being plainly inequitable very strict proof of its existence should be required before it is acted upon.

Sahib Rai v. Khair Shah (1), *Bakhtawar v. Sultan Ahmad* (2), *Rutta v. Mal Singh* (3), *Sultan Khan v. Syad Muhammad Shah* (4), *Lal Shah v. Karim Bakhsh* (5), *Murid v. Mussammatt Ram Devi* (6), and *Raja and another v. Sarfaraz and another* (7) followed.

*Petition for revision of the order of M. S. D. Butler, Esquire,
Collector of Hoshiarpur, dated 22nd May 1900.*

The facts of this case sufficiently appear from the following judgment which was delivered by

(1) 19, P. R., 1876.

(4) 59, P. R., 1877.

(2) 83, P. R., 1876.

(5) 96, P. R., 1879.

(3) 122, P. R., 1876.

(6) 127, P. R., 1879.

(7) 162, P. R., 1883.

REVISION SIDE.

31st Dec. 1900.

THE FINANCIAL COMMISSIONER.—The plaintiffs, who are the recorded occupancy tenants, claim half the price of *munj* and *kharkana* alleged to have been taken by the landlord. Their case is that the land in suit was washed away some twenty years ago, and that after its re-appearance they some years ago planted *kharkana* and *shisham* trees, but were forcibly dispossessed by the landlord in 1898; who thereupon prevented them from cutting the *munj* and *kharkana* and took it himself.

The Courts below have found that the occupancy tenants in this village (Alawalpur) who pay in kind lose their occupancy rights when their land is washed away and dismissed the claim for this reason.

In my opinion this decision is based on a wrong ground. There is no distinct provision in the *Wajib-ul-arz* declaring the custom as to loss or retention of the occupancy right in case of diluvion and an elaborate inquiry extending to 29 villages in this part of the country shows conclusively that there is no general and uniform custom, the custom, where proved at all, varying from place to place.

Following the Chief Court decisions in *Sahib Rai v. Khair Shah* ⁽¹⁾, *Bakhtawar v. Sultan Ahmad* ⁽²⁾, *Rutta v. Mal Singh* ⁽³⁾, *Sultan Khan v. Syad Mahammad Shah* ⁽⁴⁾, *Lal Shah v. Karim Bakhsh* ⁽⁵⁾, *Murid v. Mussammatt Ram Devi* ⁽⁶⁾, and *Raja and another v. Sarfaraz and another* ⁽⁷⁾, I hold that the general rule in the Punjab is that an occupancy tenant does not lose his right by reason of the land of his holding being submerged. A custom to the contrary may be proved, but such a custom is plainly inequitable and very strict proof of it should be required before it is acted upon.

In the present case the presumption arising from the above view of the law and the presumption arising from the entry in the annual record are in favour of the tenants.

On the other hand they may be disqualified by abandonment from asserting the right which would otherwise accrue to them under these presumptions.

They certainly have not proved any connection on their own part with the land since its re-appearance. They do not profess ignorance of their rights; on the contrary they pretend to have asserted them and have not made good their pretence.

⁽¹⁾ 19, P. R., 1876.

⁽⁴⁾ 59, P. R., 1877.

⁽²⁾ 83, P. R., 1876.

⁽⁵⁾ 96, P. R., 1879.

⁽³⁾ 122, P. R., 1876.

⁽⁶⁾ 127, P. R., 1879.

⁽⁷⁾ 152, P. R., 1883.

I think there is no doubt that they have stood by for some years, while the landlord has been taking such produce as there was, and I therefore hold that they have failed to cultivate the tenancy without sufficient cause for more than one year, and have therefore abandoned it.

Application rejected. No order as to costs.

Application dismissed.

No. 9.

Before the Hon'ble C. L. Tupper, C.S.I., Financial Commissioner.

GHULAM HUSSAIN, — (DEFENDANT), — PETITIONER,

Versus

AZIZ BAKHSH AND OTHERS, — (PLAINTIFFS), —
RESPONDENTS.

REVISION SIDE.

Revision No. 474 of 1898-99.

Landlord and tenant - Share of - In kankar extracted from tenant's holding.

Held, that in the case of batai paying land kankar dug out by an occupancy tenant should be shared between the landlord and tenant in the same proportion as the crop is shared.

Petition for revision of the order of C. M. King, Esquire, Collector of Jullundur, dated 12th June 1899.

The following judgment was delivered by

THE FINANCIAL COMMISSIONER. — This is a suit for the price of *kankar* taken by occupancy tenants paying *betai* for three *kanals* one *marla* of *chahi* land. 30th Jany. 1901.

There have been former suits in similar cases from the same locality and the decisions are conflicting. All allow the proprietor something, but in two cases the Courts have given them the whole value of the *kankar*, in one case two-fifths of its value and in one case half. It is desirable to lay down a consistent rule once for all.

The *kankar* is according to the entry in the *Wajib-ul-arz* the property of Government. But the Commissioner has rightly decided the case as one between landlord and tenant, the Government not being a party and having so far made no claim.

Neither party has any better right to the *kankar* than the other. No decisions of superior Courts have been found bearing on the questions at issue which are, is the landlord entitled to the whole of the *kankar* or its value, or to any share of the same, and if the latter then what share?

Decisions have been quoted as to rights in trees, but these are clearly inapplicable.

It is expedient to lay down some rule which shall be clear in itself and easy of application.

I think that in the case of *batai* paying land *kankar* should be shared between landlord and tenant in the same proportion as the crop is shared, because the loss of a possible crop on the land from which *kankar* is taken is the measure of the loss sustained by the parties by the land being used for quarrying instead of for agriculture. Each party will thus be recouped for his loss in proportion to the loss sustained. As to the argument that when *kankar* is extracted the tenant has not to bear the cost of cultivation, and that the landlord should therefore have the larger share, it must be remembered that the tenant will ordinarily have to bear the expense of restoring the land to a culturable condition.

I therefore decide that the landlords are entitled to the same share of the value of the *kankar* as they are entitled to take in *batai*. Here the land is *chahi* and the rate of *batai* is one-third. Hence the landlords are entitled to one-third of the value of the *kankar*. This has been assessed at Rs. 26. The landlord's share will, therefore, be Rs. 8 annas 10 and 8 pies.

Application allowed, decree modified accordingly. No order as to costs, the matter being one which required decision.

Application allowed.

No. 10.

Before the Hon'ble C. L. Tupper, C. S. I., Financial Commissioner.

RAHIM BAKHSH AND OTHERS,—(PLAINTIFFS),—
PETITIONERS,

Versus

RAHIM BAKHSH,—(DEFENDANT),—RESPONDENT.

Revision No. 216 of 1899-1900.

Occupancy rights—Punjab Tenancy Act, 1868, Section 6, and Punjab Tenancy Act, 1887, Sections 6 and 111—Admission by tenant made previous to 1887 that he was merely tenant-at-will.

In a case to contest a notice of ejectment, it was proved that at the Regular Settlement 1858, the ancestors of the tenants were recorded as having occupancy rights in the land now in dispute, but that during the Revised Settlement in 1880 the tenants entered into an agreement with the landlords admitting that they were mere tenants-at-will.

REVISION SIDE. {

Held, that before the passing of the present Tenancy Act (XVI of 1887) it was lawful for tenants to surrender their occupancy rights to the landlord and that the tenants had done so by agreement and that they were thus undoubtedly tenants-at-will at the date of the passing of the present Tenancy Act, Section 6 of which did not confer on them a *status* which they had so surrendered.

Held, also, that a mere voluntary admission by a tenant does not operate to deprive him of his right. Revenue Courts, therefore, before refusing to recognise an occupancy right on the ground that the tenant has voluntarily admitted himself to be a tenant-at-will should satisfy themselves that there has been an actual and valid agreement to relinquish the right.

Charayh v. Mirza (1) considered and affirmed.

Petition for revision of the order of R. Clarke, Esquire, Commissioner, Lahore Division, dated 23rd March 1900.

Shah Din, for petitioners.

Parker, Harkishen Lal and Gokal Chand, for respondent.

The following judgment was delivered by

THE FINANCIAL COMMISSIONER.—This is a claim to contest notice of ejectment from 669 *kanals* 18 *marlas* of land in *mauza* Buch, *tahsil* Mooltan. 7th Feby. 1901.

At the Regular Settlement of 1858, the ancestors of the tenants were recorded as having occupancy rights in the land in suit. Their occupation and that of the present tenants appears to have been continuous.

It is contended that though they were no doubt occupancy tenants up to the period of the Revised Settlement of 1880, yet they then forfeited their occupancy rights by agreeing with their landlords that they were merely tenants-at-will.

At attestation in the Revised Settlement the tenants undoubtedly did agree with the landlords as above. I have carefully examined the attestation papers in all stages and this is not a case of a mere voluntary admission. The landlords as well as the tenants took part in the proceedings, and great care was exercised to see that the tenants knew what they were about. I do not think there is any sound reason to discredit those proceedings in any way, though some of them took place in 1876 and the final order was passed in 1878.

A long argument was addressed to me at the hearing in this case on the doctrine of estoppel and the effect of Section 115 of the Evidence Act. I do not find it necessary to go into that question because the express provisions of the Tenancy Acts are sufficient for the decision of the case.

(1) 4, P. R., 1896, Rev.

There is no doubt that until the Act of 1887 came into force on November 1st of that year, tenants were competent by such an agreement with the landlords as is here alleged, to divest themselves of their occupancy rights. Section 2 of the Tenancy Act of 1868, which remained in force till that date, provided that nothing in that Act contained should affect the operation “of any agreement between a landlord and a tenant, when such agreement is in writing or recorded by the proper officer in the record of a Regular Settlement sanctioned by the Local Government.” Here the agreement is in writing and is recorded by the Settlement officials in the ordinary course of their duty, the result being shown in the completed record which exhibits the tenants as tenants-at-will.

There is no doubt also that if the agreement had been made after the passing of the Act of 1887, it would have been void under Section 110 (1) (a) to the extent to which it purported to override any of the provisions of that Act with respect to the acquisition of a right of occupancy.

Section 111 of that Act, however, differs most materially from Section 2 of the Act of 1868. So much of Section 111 as is material stands thus :

“Save as expressly provided in this Act, nothing in this Act shall affect the operation of any agreement between a landlord and a tenant when the agreement either is in writing or has been recorded in a record of rights before the passing of the Punjab Land Revenue Act, 1887.”

Now amongst the express provisions of the present Act is Section 6. This also differs very materially from the corresponding section (also Section 6) in the Act of 1868 which merely raised a presumption in favour of the tenant. The present Section 6 declares that a tenant who fulfils certain conditions shall be deemed to have a right of occupancy unless the contrary has been established by a decree of a competent Court in a suit instituted before the passing of the Act.

If, then, this is one of the express provisions to which reference is made in Section 111, the tenants in the present case, who have, as a fact, fulfilled these conditions, are entitled to a decree.

This, however, is not the construction which I put upon Section 111 in *Surab v. Churagh* ⁽¹⁾ nor do I think it is the correct construction. In the judgment to which I have referred I said, “except in so far as the Act deliberately declares certain agreements and entries to be void, agreements opposed to its pro-

(1) 3, P. R., 1897, Rev.

"visions are upheld by Section 111." If the Legislature had meant by Section 111 that landlords and tenants could not in any case whatever contract themselves out of the provisions of the Act they would doubtless have said so. But so far from doing this they laid down in express language in Section 110 that certain agreements made after the passing of the Act should have no effect; and Section 110, if Section 111 operated to bar all agreements in variation of the Act, would have been altogether superfluous.

There is nothing in Section 6 about an agreement. It is true it defines only one way in which the right of occupancy conferred by it in virtue of an entry in a record of rights made before 21st October 1868 and subsequent continuous occupation can be set aside, *viz.*, by a decree granted in a suit instituted before 1st November 1887; but if I were to hold that a tenant who would otherwise have acquired such right was, before the date last named, incapable of surrendering by agreement his right of occupancy to his landlord, I should virtually give retrospective operation to Section 110 (1) (a). This the express terms of Section 110 forbid me to do; and moreover on general grounds it is obviously right to construe with strictness provisions in restraint of agreement.

Briefly, before the passing of the present Act, it was lawful for the tenants to surrender their occupancy rights to the landlord; they did so surrender their rights by agreement made in 1876 and 1878; they must have had complete knowledge of this as they were very carefully questioned at the time: they were undoubtedly tenants-at-will at the date of the passing of the present Act; and I am unable to hold that Section 6 confers upon them a *status* which they had thus agreed to surrender.

It only remains to notice the terms of the Commissioner's order. He wrote:—

"I agree with the Collector in holding that the entry made in the record of rights in 1878, and never disputed till now, amounts to an agreement under Section 111, and it is not for a Revenue Court to go behind the entry and enquire how it was made and what was the consideration. I therefore reject the appeal."

In these observations I do not altogether concur. The mere entry in the record of right does not amount to an agreement. The record of rights in the preparation of which the agreement occurred was not made before November 18th, 1871, nor was the matter of the agreement one of the matters specified in Section 112.

In cases such as the present it has been established by several decisions (*viz.* *Khair din v. Mohamed* ⁽¹⁾, *Hem Singh v. Jiwan* ⁽²⁾ and *Charagh v. Mirza* ⁽³⁾) that there must be an actual agreement; a mere voluntary admission by the tenant will not operate to deprive him of his right. Revenue Courts must before refusing to recognise an occupancy right in such a case as this certainly satisfy themselves that there has been an agreement; otherwise the principle of Revenue Judgment *Charagh v. Mirza* ⁽³⁾ which, on full consideration, I affirm, would apply Claims of landlords to annul the occupancy right on grounds of voluntary admission only are inadmissible since old Section 6 was repealed by the present enactment. The landlords who come forward with such claims now have missed the opportunity which the Legislature gave them for more than twenty years.

As to the consideration, which is part of a valid agreement, I need only say as regards the particular case before me that where, after a dispute touching the right of the landlord to eject, the landlords and tenants concurred more than twenty years ago in a particular entry, of which the tenants must have had knowledge and which they never contested till now, to inquire into the consideration would be merely to invite the fabrication of evidence, and consideration in such a case must be presumed.

The Courts below have rejected the claim for occupancy rights, and for the reasons given above I agree with them. Application dismissed. No order as to costs, the questions involved being disputable.

Application dismissed.

(¹) 16, P. R., 1872. (²) 3, P. R., 1888, Rev.

(³) 4, P. R., 1896, Rev.

No. 11.

Before the Hon'ble C. L. Tupper, C.S.I., Financial
Commissioner.

HAZARI MAL AND ANOTHER,—(DEFENDANTS),—
PETITIONERS,

Versus

JOTI MAL,—(PLAINTIFF),—RESPONDENT.

} REVISION SIDE.

Revision No. 151 of 1899-1900.

*Entries in record of rights and annual records—Mutation of names—
Construction of decree—Procedure when parties dispute the construction of a
decree—Punjab Land Revenue Act, 1887, Section 37.*

Held, following *Harnand v. Jamna* ⁽¹⁾ that a Revenue Officer dealing with a mutation case should decline to go behind the plain language of a decree which is still in force and which has not been varied or set aside or superseded by any act of parties or a competent authority.

Naobat Rai v. Taj Muhammad ⁽²⁾ referred to.

Petition for revision of the order of R. Clarke, Esquire, Commissioner of Lahore Division, dated 30th April 1900.

Bhagwan Das, for petitioners.

Madan Gopal, for respondent.

The following judgment was delivered by

THE FINANCIAL COMMISSIONER.—The counsel on both sides *28th April 1901* admit that the decree of 3rd February 1897 has not been varied by the subsequent proceedings except as noted by the District Judge, Pandit Hari Kishen Kaul, whose *addendum* is immaterial.

The applicant relies on the decree.

The contention of Mr. Madan Gopal is that the decree is not in accordance with the compromise on which it was founded, and that the real intention of the parties is to be gathered from that compromise and the documents relating to extensions of time referred to by the Commissioner. Chief Court Civil Ruling *Naobat Rai v. Taj Muhammad* ⁽²⁾ is quoted in support of the contention.

The summary nature of mutation proceedings has been explained in *Harnand v. Jamna* ⁽¹⁾. A Revenue Officer dealing with a mutation case should decline to go behind the plain language of a decree in force, not varied or set aside or superseded by any act of parties or competent authority.

(¹) 1, P. R., 1901, Rev.

(²) 84, P. R., 1885.

Here the decree unquestionably gives a mortgage right, not a proprietary right.

The order of the Commissioner is therefore set aside and that of the Collector restored.

Application allowed.

No. 12.

Before the Hon'ble C. L. Tupper, C. S. I., Financial Commissioner.

REVISION SIDE. {

SOHNA AND OTHERS,—(DEFENDANTS),—PETITIONERS,

Versus

MUHAMMAD BAKHSH,—(PLAINTIFF),—RESPONDENT.

Revision No. 42 of 1900-1901.

Transfer of right of occupancy under Section 5 (1) (c)—Measure of fixing value by the Revenue Officer—Punjab Tenancy Act, 1887, Section 53, clauses (3) (4).

Held, that the value to be fixed for the purposes of Section 53 of the Tenancy Act is the value of the holding to the tenant at the time when the notice of the tenant's intention to transfer is served on the landlord. The best measure of that value is what the tenant was able to get and was willing to accept at that time.

Petition for revision of the order of T. Miller, Esquire, Collector of Ferozepore, dated 26th October 1900.

The following judgment was delivered by

2nd May 1901.

THE FINANCIAL COMMISSIONER.—I do not know on what principles the value has been fixed at Rs. 3,096-10-8, apparently the officers concerned sought to ascertain the market value; but there is nothing about market value in Section 53 of the Act.

The value to be fixed for the purposes of Section 53 of the Tenancy Act is the value of the holding to the tenant at the time when the notice of the tenant's intention to transfer is served on the landlord. The best measure of that value is what the tenant was able to get and willing to accept at that time.

In this case there is no reason to question the *bona fides* of the offer of Khema at Rs. 5,160. It is not suggested that that sum was fictitiously increased to avoid the rights of the landlords. If the price included interest due to Khema, this is immaterial. This merely means that the value to the tenants was so much the greater because by a transaction with this particular creditor they would be able to free themselves from the debts outstanding against them.

It is not the intention of the Act to facilitate the extinction of occupancy rights, and there is no reason to help landlords to absorb the rights of their tenants by allowing them to purchase such rights cheap.

I set aside the Collector's order, and fix Rs. 5,160 as the value of the right of occupancy here in question.

If the landlord pays this sum to the Assistant Collector within three months from this date, he shall be deemed to have purchased the land. If he fails to do so the tenants may sell their holdings to Khema or not sell it at all.

Application allowed.

No. 13.

*Before the Hon'ble C. L. Tupper, C.S.I., Financial
Commissioner.*

GURDAS AND ANOTHER,—(PLAINTIFFS),—PETITIONERS,

Versus

HASSAN,—(DEFENDANTS)—RESPONDENT.

REVISION SIDE.

Revision No. 153 of 1900-1901.

*Jurisdiction—Jurisdiction of Revenue Courts to re-open matters decided
a competent Civil Court.*

Held that the Revenue Courts are not competent to go behind the decision of Civil Courts and re-open matters already decided by competent judicial authority, or where the claim is based on a Civil Court's decree to enter on enquiries which substantially involve the issue as to whether that decree has been rightly given or not. The Revenue Courts should always accept such a decree and act upon it.

*Petition for revision of the order of Captain F. E. Bradshaw,
Collector of Jullundur, dated 13th December 1900.*

The following judgment was delivered by

THE FINANCIAL COMMISSIONER.—The situation reached in 5th June 1901. consequence of the orders of the Courts below is that whereas Gurdas and another hold the decree of a Civil Court passed in 1895 entitling them to possession, the Revenue Courts have practically made that decree of no effect by dismissing the suit of these persons for produce claimed as rent.

This situation cannot be accepted. It is not permissible for the Revenue Courts to go behind the decision of Civil Courts and re-open matters already decided by competent judicial authority. In a suit like this for rent where the claim was based on a Civil Court decree it was altogether wrong to enter on enquiries which

substantially involved the issue whether that decree had been rightly given or not. The Revenue Courts should have acted upon the decree and acted upon it.

The facts of the case are somewhat complicated, and may be briefly recapitulated.

Munshi and Tulsi were the original owners of the land. On 16th January 1889, they mortgaged it by an unregistered deed to one Sandhi for Rs. 80. Then on 26th and 27th September 1890 they sold it, subject to Sandhi's mortgage to Hassan and Nabi Bakhsh, by two unregistered deeds of Rs. 99 each.

Next Munshi sold the land by registered deed for Rs. 250 to Roshan. The deed was dated 23rd October 1893, and registered on the 24th of the same month. It is alleged that Munshi received only Rs. 10, the remaining consideration not being performed.

Upon this Hassan and Nabi Bakhsh brought a suit for possession in December 1893 against Sandhi, mortgagee, and Roshan. The suit was dismissed on 14th November 1894, the registered deed being given priority according to the law in force at the time.

Meanwhile, soon after the institution of the above suit, on 13th December 1893, Roshan sold his right for Rs. 250 by registered deed to present applicants, Gurdas and another.

Gurdas and another then sued Roshan and Sandhi and obtained a decree for possession on 1st May 1895.

The Revenue Courts must give effect to that decree. It is not their business to enquire whether it was right or wrong.

Gurdas and another are entitled to the rent of the land. It was *batai* the share of the produce and value thereof must be ascertained. If Hassan has kept what he ought to have paid in rent, decree should be given against him. If he has paid rent to Tulsi and Munshi who were defendants in the first Court the decree should be given against them. The Courts below must settle the amount of the rent due and the person or persons from whom it is recoverable under Section 14 of the Tenancy Act.

I remand the case for a fresh decision with reference to the above remarks.

Application allowed.

No. 14.

Before the Hon'ble C. L. Tupper, C.S.I., Financial
Commissioner.

MOMANDA, —(PLAINTIFF), —PETITIONER,

Versus

SALID AND OTHERS, —(DEFENDANTS), —RESPONDENTS.

REVISION SIDE.

Revision No. 182 of 1900-01.

Entries in record of rights and annual records—Mutation of names—
Montgomery Land Revenue Act, 1887, Sections 37, 44.

The mutation procedure is not designed for the final settlement of rights; its object is to bring the annual record into accordance with the facts which are most probably true. Revenue Officers should therefore refuse mutation of names based on alienations *prima facie* void until a decision affirming the validity of the ostensible transfer is obtained.

Reference for revision of the order of J. P. Thomson, Esquire, Collector of Montgomery, dated 18th April 1901.

The following judgment was delivered by

THE FINANCIAL COMMISSIONER.—The facts of this case are as follows:— 17th Sept. 1901.

One Momanda, an Arain of the Dipalpur Tahsil in the Montgomery District, has divorced two wives, Mussammat Fatch and Mussammat Rajan, and has a son, Sher Ali, aged 12 years, by the latter. He has married a third wife Mussammat Bhagan, and has executed a registered *tamliknama* in her favour in respect of half of his one-ninth share in an ancestral holding; and on the basis of this document he asks for mutation of names in Mussammat Bhagan's favour. The Naib-Tahsildar holding that there was no necessity for the alienation in Momanda's life-time, and that it was fictitious and made probably to injure the interests of Sher Ali, has disallowed the mutation. This order has been upheld by the Collector on appeal.

I am of opinion that the order thus upheld must be affirmed.

The object of the mutation procedure is to bring the annual record into accordance with facts. Under Section 44 of the Land Revenue Act an entry in an annual record is presumed to be true. In altering the record by the mutation procedure we are bound, with due regard to the conditions of a summary inquiry, to satisfy ourselves that the altered record will be at least most probably true. A safeguard is provided by Section 37 of the Act, which enacts that the new entries must (1) be in accordance with facts proved or admitted to have occurred, or (2) be

agreed to by all the parties interested therein, or (3) be supported by a decree or order binding on those parties.

The mutation procedure is not designed for the final settlement of rights. It is concerned merely with the alteration of presumptions. The Act therefore requires only a summary inquiry ending in a presumption. If we go beyond this and attempt to make the inquiry in mutation cases as full as the inquiry ought to be in a judicial case, we ignore the distinction which the legislature has drawn between the acts of Revenue Officers and the acts of Civil or Revenue Courts.

We may be satisfied therefore in mutation cases with *prima facie* proof; but it must be proof sufficient to raise a strong presumption. If neither party can establish a strong presumption, mutation must be refused, and the parties left to settle their dispute by obtaining a decree.

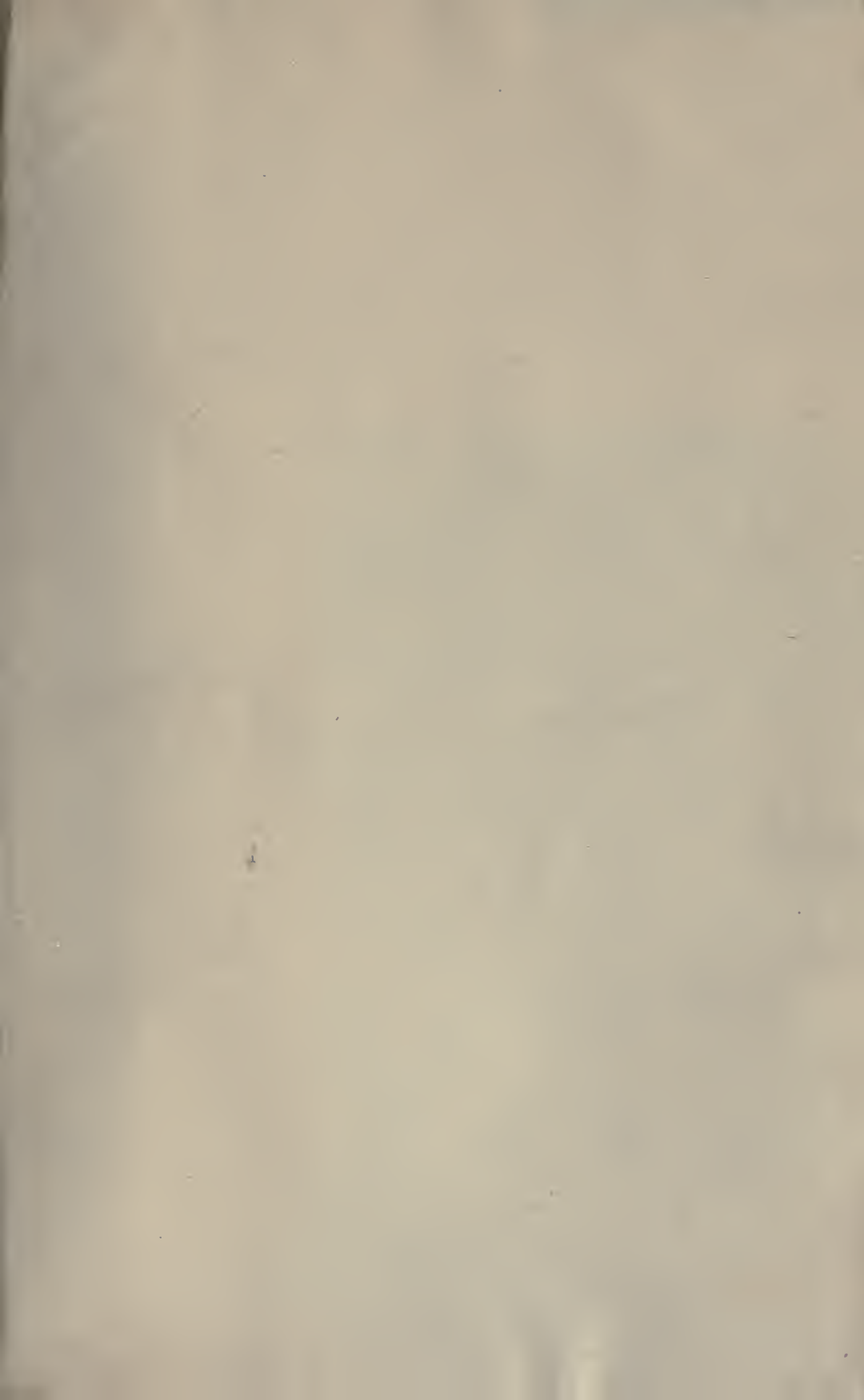
Applying the above doctrine to the present case I observed that there is no agreement or decree here, and that the fact proved or admitted to have occurred is the attempted gift of a share in ancestral land to Mussammatt Bhagan. Ancestral immovable property in the Punjab is ordinarily inalienable except for necessity or with the consent of male descendants, or in the case of a sole proprietor of his male collaterals (Rattigan's *Digest*, Extra Edition, Section 58). No such necessity is shown here as is referred to in Section 63 of Rattigan's *Digest*. There is no consent of the son or of the collaterals. The fact admitted to have occurred therefore is that Momanda has attempted to make a gift which is *prima facie* void. The Revenue Officers dealing with this mutation case were not bound to go further and find, as a Civil Court might have to do, whether or no the gift was in fact void under the customary law applicable to the parties. It was quite sufficient for the purposes in view that the gift was *prima facie* void.

Mutation of the entry as regards proprietary right has therefore rightly been refused, and must not be allowed until Momanda and Mussammatt Bhagan obtain a decree affirming the validity of the ostensible transfer.

The case, I may add, is distinguishable from that of an occupancy tenant who makes a transfer of his right of occupancy in contravention of the provisions of Chapter V of the Tenancy Act, because such a transfer is not *prima facie* void; it is merely voidable under Section 60 of the Tenancy Act, at the instance of the landlords.

No order as to costs. Application rejected.

Application dismissed.



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